Supreme Court, U.S.
FILED

09-966 FEB 13 2010

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Nos. 2009 – 3167, – 3169*

In The
Supreme Court of the United States

DOM WADHWA, M.D., *pro se*
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

Matthew H. Solomson, Esquire
Lauren A. Weeman, Esquire,

Attorneys for the Respondent

On Petition For A Writ of Certiorari
To The United States Court of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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*Please note: The Federal Court of Appeals for the Federal Circuit approved consolidation of Docket Nos. 2009-3167 & 2009-3169 Wadhwa v. Dept. of Veterans Affairs for a rehearing of the judgment entered on November 19, 2009.

Dated: February 14, 2010

QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit has rendered an opinion is in conflict with its prior opinion in the case of *Wadhwa vs. Merit Systems Protection Board, Fed. Cir. No. 2009 – 3167, -3169.*

* Please note: The Federal Court of Appeals for the Federal Circuit approved consolidation of Wadhwa v. Dept. of Veterans Affairs Docket Nos. 2009-3167 (Wadhwa1) & 2009-3169 (Wadhwa2) for a rehearing of the judgment entered on November 19, 2009.

On March 13, 2009, the Merit Systems Board issued an Opinion and Order for two appeals on the same day. The first Opinion and Order was for MSPB Docket No. PH-1221-08-0019-W-1 (Wadhwa1), filed on October 10, 2007, and the second Opinion and Order was for MSPB Docket No. PH-1221-08-0502-W-1 (Wadhwa2), filed on July 6, 2008.

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ABBREVIATED BACKGROUD OF FACTS

The Appeals Court Panel Erred as a Matter of Law

a. by failing to address, reference or analyze petitioner's material factual allegations,

b. by failing to draw inferences favorable to the petitioner from the limited allegedly uncontested material factual allegations that the Appeals Court Panel did address in its decision,

c. by impermissibly drawing inferences favorable to the defendant from the material allegedly uncontested factual allegations that the Appeals Court Panel did address in its decision,

d. by impermissibly making factual findings against petitioner in the absence of a factual basis to support the factual findings,

e. by impermissibly making factual findings against petitioner where the underlying factual support was in dispute, and

f. by failing to construe the evidence in a light most favorable to petitioner in affirming the Merit Systems Protection Board's summary disposition – in that the Appeals Court Panel failed to address, consider or otherwise analyze petitioner's material factual allegation;

The Appeals Court Panel Erred as a Matter of Law When It Implicitly Concluded that My (Dr. Wadhwa's) Perceived Retaliation Claim Did Not Present a Triable Issue of Fact;

The Appeals Court Panel Erred as a Matter of Law by Impermissibly Making Factual Findings Against Me (Dr. Wadhwa) Where the Underlying Factual Support Was Disputed.

STATEMENT OF THE CASE AS REQUIRED BY RULE 35(b)(1) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Based on my reasoned judgment, I believe this appeal requires answer to the precedent-setting question of exceptional importance:

(a) Is the Appeals Court Panel strictly bound to the summary judgment formulation set for in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986), in each phase of a summary judgment analysis?

Based on my reasoned judgment, I believe the Appeals Court Panel misapplied summary judgment principles by weighing evidence during the *pretext* stage of its analysis of the summary judgment issue, in violation of the Supreme Court's formulation of summary judgment principles set forth in

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit on November 19, 2009 is reported in **Exhibits A & Exhibit C**. The Rehearing Order is reported in **Exhibits B & Exhibit D**. The Final Opinion & Order of the Merit Systems Protection Board ("Board") is reported in **Appendix One & Appendix Four**. A timely appeal for a petition for review was denied by the Board on March 13, 2009. A timely appeal to the United States Court of Appeals for the Federal Circuit was filed on May 12, 2009 for Docket No. 2009-3167 **(Appendix Two)** and May 25, 2009 for Docket No. 3169. **(Appendix Five)**

JURISDICTION

The Court of Appeals for the Federal Circuit filed its decision on November 19, 2009 for my (Dr. Wadhwa's) appeal to the Board and thereafter entered its order denying my (Dr. Wadhwa's) motion for rehearing for Docket Nos. 2009-3167, 3169 on February 3, 2010. **(Exhibits B & Exhibit D)** This court has jurisdiction under 28 U.S.C. § 1254 (1) to review the U.S. Court of Appeals for the Federal Circuit's decision by writ of certiorari.

BASIS FOR INVOKING JURISDICTION

The basis for invoking the jurisdiction of the U.S. Supreme Court is that the U.S. Court of Appeals for the Federal Circuit has rendered an opinion in my case that conflicts with its prior opinions and the opinion involves fundamental issues of broad public importance requiring determination by the U.S. Supreme Court.

SUPREME COURT OF THE UNITED STATES

1 First Street, NE
Washington, DC 20543

Dom Wadhwa, M.D., *pro se*
Petitioner,

US Court of Appeals
for the Federal Circuit
Docket Nos. 2009-3167, -3169

v.

Department of Veterans Affairs,
Respondent.

Petitioner's Request for Writ of Certiorari

Pursuant to the Supreme Court of The United States Rules of Practice, I, Dom Wadhwa, M.D., *pro se*, hereby file with this Honorable Court a *Petitioner's Request for Writ of Certiorari* on the issues that are the subject for review for Docket Nos. 2009-3167, -3169,[1] for the U.S. Court of Appeals for the Federal Circuit, dated November 19, 2009.

This court has jurisdiction under 28 U.S.C. § 1254 (1) to review the U.S. Court of Appeals for the Federal Circuit's decision by writ of certiorari.

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[1] Please note: The Federal Court of Appeals for the Federal Circuit approved consolidation of Docket Nos. 2009-3167 & 2009-3169 Wadhwa v. Dept. of Veterans Affairs for a rehearing of the judgment entered on November 19, 2009.

POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL OF THE COURT

1. The Panel of the Court for the U.S. Court of Appeals for the Federal Circuit misapprehended the law by concluding that the Department of Veterans Affairs (DVA, Agency) did not violate the Whistleblower Protection Act (WPA) by reassigning me (Dr. Wadhwa) from the Primary Care Clinic to the Compensation and Pension (C&P) Section of the Philadelphia VA Medical Center (PVAMC).

2. The Panel of the Court misapprehended the law by affirming the granting of summary judgment, by failing to consider genuine issues of material fact, by weighing conflicting evidence, by making credibility findings, by drawing inferences in favor of the Petitioner and by failing to draw reasonable inferences favorable to the Respondent, as the non-moving party.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Abbreviated Background and Facts

The relevant and material abbreviated facts[2] set forth below are contained in my briefs for: Docket No. 09-3167 – dated May 12, 2009 and September 10, 2009; and for Docket No. 09-3169 – dated May 25, 2009 and September 14, 2009. The factual allegations contained in these *Briefs* (Appel. B.[3]) include specific references to the *Appendix of Appellant,*[4] for Docket No. 09-3167 and Docket No. 09-3169, also filed.

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[2] In *Oncale v. Sundowner Offshore Service, Incorporated*, 523 U.S. 75, 76, 118 S. Ct. 998, 1000 (1998), Justice Scalia, speaking for the unanimous court stated "The District Court having granted summary judgment for respondents, **we must assume the facts to be as alleged by petitioner....**" (Emphasis supplied).

[3] Refers to Brief of Appellant for Docket No. 09-3167 and Docket No. 09-3169.

[4] Refers to Appendix of Appellant. The is appendix comprised of one volume for Docket No. 09-3167 and one volume for Docket No. 09-3169 pursuant to Federal Rules of Civil Procedure.

On December 19, 2006, I (Dr. Wadhwa) was employed by the VA Northern Indiana Health Care System (VA NIHCS) and I received a Directed Reassignment Order from William F. Feeley, Deputy Secretary, Department of Veterans Affairs for Health for Operations and Management for my immediate return to my previous position as a Primary Care physician at the Philadelphia VA Medical Center (PVAMC) or be separated from my over twenty-year tenured employment with the Department of Veterans Affairs.

I accepted the Directed Reassignment Order and I returned to work at PVAMC within three workdays of my transfer to VA NIHCS from PVAMC.[5] On January 4, 2007, I was advised in-person at PVAMC by my immediate supervisor, John Murphy, M.D., to begin seeing patients in Primary Care at PVAMC, effective Monday, January 8, 2007. The following day, on January 5, 2007, I was notified by my second level supervisor, Michael Grippi, M.D., not to return to work at PVAMC until further notice.

Unbeknown to me at that time, a ten-member panel met sometime in January 2007 to discuss my return to PVAMC. This panel was composed of Michael Sullivan, former Medical Center Director, Margaret O'Shea-Caplan, Associate Director, Martin Heyworth, M.D., former Chief of Staff, Michael Grippi, M.D., former Associate Chief of Staff for Primary Care and Consultative Medicine, John

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[5] PVAMC is an organizational sub-entity of Defendant, U.S. Department of Veterans Affairs. R. James Nicholson, Secretary of Department of Veterans Affairs, is the nominal defendant-appellee in this action. See F.R. Civ. P. 25

Murphy, M.D., Director of Primary Care, Carol Patterson, Vice President for Medicine Service, Mukesh Jain, M.D., former Medical Director for Quality Management, Gerald Morelli, Chief of Human Resources, Jose Lopez, Esquire, Regional Counsel, and Timothy Graham, Esquire, Privacy and FOIA Officer.

On January 18, 2007, Dr. Grippi informed me of my return-to-work date of January 22, 2007 and that due to a "critical need" in the C&P Section, I would be temporarily assigned to the C&P section for a period of time not to exceed 30 days, until the backlog of C&P cases was relieved. Every day, while performing my temporary assignment in the C&P section, I was required to train myself in the correct performance of the spectrum of C&P examinations. This necessitated that I work nights and weekends on my own time and without monetary compensation in order to attain expertise in the performance of C&P examinations through a series of lectures and competency examinations.

In March 2007, the backlog of C&P cases was relieved and I approached Dr. Murphy for my return to Primary Care, where another critical need had been created by my absence from Primary Care. Dr. Murphy stated that he would get back to me about this, but he never did. On September 12, 2007, in response to my inquiry, Dr. Murphy informed me via e-mail that my reassignment to the C&P Section was permanent. I immediately contacted the Office of Special Counsel that my reassignment from the Primary Care Clinic to the C&P section was done in

retaliation for my whistleblower disclosure protected under the WPA.[6]

After I contacted the IG on July 23, 2006, I was targeted with a series of discriminatory acts. These retaliatory acts included, but were not limited to, the following:

- Proposed fourteen (14) day suspension on July 26, 2006
- Upgraded to a proposed removal from my 20- year VA employment on August 30, 2006
- Administrative leave from October 27, 2006 to January 21, 2007
- Directed Reassignment Order, issued on December 19, 2006, for my return from VA NIHCS to PVAMC with a demotion, drop in my annual salary, and denial of my performance pay in Primary Care
- Removal from a clinical assignment and placement in a nonclinical assignment on January 21, 2007
- *Reactivated* proposed removal from my 20-year VA employment, dated January 25, 2007
- Local Administrative Investigation Board convened at an unspecified date in 2007
- National Administrative Investigation Board convened on March 13, 2007

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[6] I alleged that the Agency retaliated against me, based on the facts that

- I made a protected disclosure on July 23, 2006, when I submitted a memorandum alleging safety violations at PVAMC to the IG,

- I showed that it was a contributing factor in my reassignment from the Primary Care Clinic to the C&P section, and

- the Agency was unable to show by clear and convincing evidence that it would have reassigned me absent any disclosure.

- Reprimand issued to me on April 3, 2007
- *False Arrest* on June 26, 2007
- Placement of VA Police surveillance camera and a large clock in the hallway outside my (Dr. Wadhwa's) office door after my June 26, 2007 *false arrest* in order to monitor my activities during my tour of duty until sometime in July 2008
- An attempt to arrest me for false charges of alleged *Battery*, alleged *Assault*, and alleged *Disorderly Conduct* on February 28, 2008
- Unreasonable *search and seizure* of my personal items on June 27, 2008

and these were described in my briefs for: Docket No. 09-3167 – dated May 12, 2009 and September 10, 2009; and for Docket No. 09-3169 – dated May 25, 2009 and September 14, 2009.

Issue 1

The Appeals Court Panel Erred as a matter of law

a. by failing to address, reference or analyze my (Dr. Wadhwa's) material factual allegations,
b. by failing to draw inferences favorable to me (Dr. Wadhwa) from the limited allegedly uncontested material factual allegations that the Appeals Court Panel did address in its decision,
c. by impermissibly drawing inferences favorable to the defendant from the material allegedly uncontested factual allegations that the Appeal Court Panel did address in its decision,
d. by impermissibly making factual findings against me (Dr. Wadhwa) in the absence of a factual basis to support the factual findings,
e. by impermissibly making factual findings against me (Dr. Wadhwa) where the underlying factual support is in dispute, and
f. by failing to construe the evidence in a light most favorable to me (Dr. Wadhwa) in affirming the Merit Systems Protection Board's summary disposition – in that the Appeals Court Panel failed to address, consider or otherwise analyze my (Dr. Wadhwa's) material factual allegations.

The Decision of the Appeals Court Panel was a decision on the merits, not a decision as to whether there were issues of triable fact, as required by a summary judgment analysis. The Appeals Court Panel affirmed the Merit Systems Protection Board's finding that my (Dr. Wadhwa's) contact of the VA IG's Office regarding the unsafe working conditions

in the Primary Care Clinics at PVAMC was inappropriate, but that my reassignment to the C&P Section was appropriate and justified and that the Agency provided legitimate, non-retaliatory reasons for this decision.

In each stage of the Appeals Court Panel's analysis, the Court failed to consider my (Dr. Wadhwa's) factual allegations, made unwarranted assumptions which were not grounded by the facts of record, impermissibly engaged in speculation and conjecture, and impermissibly drew inferences in favor of the defendant.

Temporary "Critical Need" in the C&P Section vs. Permanent Reassignment to the C&P Section

The Appeals Court Panel analyzed this issue by starting with an ultimate conclusion which had no basis in fact, namely that when I (Dr. Wadhwa) returned to work after a three work day absence, I had been reassigned because of "performance problems."[7] The Appeals Court Panel then developed a legal analysis based on that flawed premise. The Appeals Court Panel, at the outset of its analysis, made the erroneous statement that my permanent reassignment to the C&P Section was based on substantial evidence provided by the Agency.

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[7] The Agency fabricated the performance appraisal document as pretext to assign me (Dr. Wadhwa) to the C&P Section. The fabricated performance appraisal document was later rescinded by the Agency, after it was used to permanently reassign me to the C&P Section, and I (Dr. Wadhwa) was offered no explanation for this decision.

The material facts necessary to reach that conclusion which the Appeals Court Panel failed to consider are as follows:

Fact 1: I was given a Directed Reassignment Order to return to my previous position in Primary Care at PVAMC by William F. Feeley, VA Deputy Under Secretary for Health for Operations and Management, on December 19, 2006, which I accepted.

Fact 2: Upon my return to PVAMC in January 2007, the Agency informed me of a "critical need" in the C&P Section (which was directly related to the Director's Performance Measures for PVAMC), and I was thus assigned to work in the C&P Section for a period of time not to exceed one month, until the backlog of cases in the C&P Section was relieved.

The reasonable inference drawn from Facts 1 and 2 is that I (Dr. Wadhwa) believed that the Agency was acting in good faith by providing me with the temporary assignment in the C&P Section.

Fact 3: I had been absent from PVAMC for three work days prior to my return to duty. The reasonable inference to be drawn from Fact 3 is that I had no knowledge that a ten-member panel would be meeting later in January to discuss my return to PVAMC.

Fact 4: During the months that I was employed in the C&P Section, I had the same supervisors, was in the same service, and received the same pay.

Fact 5: While I was temporarily assigned to the C&P Section, my position in Primary Care was vacant, which created a "critical need" in Primary Care.

Fact 6: There was never any paperwork generated by the Agency to reflect that there was any formal or informal personnel action associated with the temporary assignment in the C&P Section.

Fact 7: There was never an alleged *Privacy Act* violation by me.

The reasonable inference drawn from Facts 4, 5, and 6 is that I (Dr. Wadhwa) was merely temporarily assigned to the C&P Section for one month in order to meet a "critical need," until I would return to my tenured position in Primary Care.

The Appeals Court Panel's characterization of this event (permanent assignment to the C&P Section) as appropriate and justified and based on substantial evidence is inaccurate and unsupported.

The logical conclusion from the Appeal Court Panel's finding that a reassignment occurred is that I (Dr. Wadhwa), believing the Agency's good faith in giving me a temporary assignment in the C&P Section, should have somehow known that I had received a personnel action (permanent assignment). There is no support in the law for this conclusion.

I (Dr. Wadhwa) had every reason to believe, at the time I returned to work at PVAMC after a three

work day absence, that the Agency was acting in good faith when it temporarily assigned me to the C&P Section because of a "critical need" in the that area, instead of returning me to my position in Primary Care.

Knew or Should Have Known Standard

The Appeals Court Panel violated summary judgment principles by drawing inferences adverse to my interests when it concluded that I (Dr. Wadhwa) failed to demonstrate the reasonableness of my alleged lack of awareness of the Agency's actual motivation, when I was temporarily assigned to the C&P Section. The Appeals Court Panel erred when it stated that I (Dr. Wadhwa) failed to demonstrate by a preponderance of the evidence that the protected disclosure to the VA IG's Office on July 23, 2006 was a contributing factor to the personnel action (permanent assignment to the C&P Section).

The Appeals Court Panel held that I (Dr. Wadhwa) should have known that I suffered a personnel action the day I was given the temporary assignment to the C&P Section. That would have presumed that I knew that there was a ten-member panel convened to discuss my return to PVAMC and that I was aware of the existence of the reasons proffered by the Agency for not returning me to my position in

Primary Care,[8] as *pretext* for its retaliation against me because of my protected disclosure. There is no evidence of this. I had been absent from employment at PVAMC for only three work days. In fact, the Directed Reassignment Order issued to me, notifying me that my failure to return to PVAMC would result in separation, presumed the contrary.

Prior to my departure to VA NIHCS, I, as a Primary Care Attending physician at PVAMC, had the largest number of patients. I had nine half day clinic sessions per week. There are no statements from management to me regarding the "reasons" given by the Agency Officials at PVAMC at the Merit Systems Protection Board Hearing on May 29, 2008 for the decision not to return me to my Primary Care assignment. There is no evidence that I knew these "reasons."

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[8] Some of the *untruthful and unsubstantiated reasons* given by the Agency to the MSPB for not returning me to Primary Care during the MSPB Hearing on May 29, 2008, are as follows:

1. I allegedly had received a large number of patient complaints while working in my original assignment in Primary Care; and
2. There were communication and collaboration problems that allegedly had arisen between me and the nurses and other staff in Primary Care.
3. Significantly, the Agency Officials at PVAMC stated that I allegedly had performance problems before I sent my letter regarding the unsafe working conditions to the VA IG on July 23, 2006. Please note: This *fake* performance appraisal report was rescinded by the Agency sometime in 2007 after I was reassigned to the C&P Section. I was offered no explanation for withdrawal of this *fabricated* performance appraisal report.

The nature of the term "temporary assignment" connotes that it is not a personnel action. The Appeals Court Panel violated summary judgment principles when it reached the conclusion that I knew or should have known that the temporary assignment, and later the permanent reassignment to the C&P Section, was based on legitimate, non-retaliatory reasons proffered by the Agency. I was not in management or administration. I presumed the Agency was acting in good faith and made the temporary assignment based on an identified "critical need" in the C&P Section.

The Appeals Court Panel, in finding against me, drew the impermissible inference, without any factual support whatsoever, that I should have been suspicious at the outset, should have challenged the Agency decision to give me the temporary assignment in the C&P Section, and should have conducted an investigation of the Agency's practices.

The Appeals Court Panel's analysis is antithetical to summary judgment principles. The Appeals Court Panel assumed, without any evidence whatsoever, that I failed to demonstrate by a preponderance of the evidence that the protected disclosure was a contributing factor to the personnel action (permanent reassignment to the C&P Section). The Appeals Court Panel reached this conclusion without any factual basis.

The Appeals Court Panel's Reference to Statements in Appellee's Brief As Evidence Against Appellant's Well-Founded Claims

The Appeals Court Panel failed to perform a rigorous analysis and failed to adhere to summary judgment principles when it impermissibly elevated statements contained in arguments made in Appellee's Brief as uncontested facts.

The Appeals Court Panel violated summary judgment principles by drawing inferences adverse to my (Dr. Wadhwa's) interest when it concluded that I failed to demonstrate the reasonableness of my lack of awareness of the Agency's actual motivation in assigning me to the C&P Section, which was based on statements in the Appellee's Brief wherein I (Dr. Wadhwa), the appellant, was characterized as having "performance problems." The Appeals Court Panel's analysis lacks factual and legal support.

The Appeals Court Panel took arbitrary, self-serving statements contained in the Appellee's Brief, made by the Agency and/or attributed to its witnesses, and then speculated that I, at the time of the temporary assignment to the C&P Section, knew I was being permanently reassigned to the C&P Section, based on these false and unsubstantiated statements.

The Appeals Court Panel failed to consider that I accepted the temporary assignment to the C&P Section, because a "critical need" had been identified there by management. The statements in the Appellee's Brief were made long after the event in question (permanent assignment) occurred, and were made for the sole purpose of furnishing legitimate,

non-discriminatory reasons for the Agency's decision to permanently reassign me to the C&P Section. The Appeals Court Panel made the unwarranted inference that, at the time I was given the temporary assignment in the C&P Section, I knew I was receiving a personnel action. There is no evidence in the record to support this unwarranted inference.

Timeliness Issue

The Appeals Court Panel engaged in speculation and conjecture in concluding that my contact with the VA IG's Office on July 23, 2006 was untimely. It created facts where none existed in the record. It failed to consider the factual allegations I presented. It made assumptions and drew inferences adverse to my interests.

The Appeals Court Panel's conclusion, purportedly reached by application of summary judgment principles, that my contact with the VA IG's Office on July 23, 2006 was unwarranted, is factually and legally unfounded. See, *Anderson v. Liberty Lobby, Inc. 477 U.S. at 255, 106 S. Ct. at 2510-2511* (the Court should view the facts in the light most favorable to the non-moving party and draw all inferences in that party's favor).

Issue 2

The Appeals Court Panel Erred As A Matter of Law When It Implicitly Concluded that My (Dr. Wadhwa's) Permanent Reassignment to the C&P Section Claim Did Not Present A Triable Issue of Fact

The Appeals Court Panel never addressed the issue of whether my (Dr. Wadhwa's) claim of permanent reassignment to the C&P Section presented a triable issue of fact and whether the MSPB's conclusion to the contrary was incorrect.

I (Dr. Wadhwa) contend that I have amply demonstrated that I proferred sufficient evidence to defeat summary judgment on this issue. The Court removed from the province of the jury the issue of whether the defendant perceived me (Dr. Wadhwa) to be an individual with "performance problems." The Court's analysis of the law is incomplete. Any individual given a *fabricated* performance appraisal that is later rescinded by the Agency is obviously a *fabricated* document that was used by the Agency as *pretext* in support of its contention to permanently assign me to the C&P Section in retaliation for my whistleblower activity.

The Appeals Court Panel incorrectly concluded as a matter of law, even though I (Dr. Wadhwa)

- Was given a Directed Reassignment Order to return to my previous position in Primary Care at PVAMC by William F. Feeley, VA Deputy Under Secretary for Health for Operations and

management on December 19, 2006, which I accepted;

- Upon my return to PVAMC in January 2007, the Agency informed me of a "critical need" in the C&P Section (which was directly related to the Director's Performance Measures for PVAMC) and I was thus assigned to work in the C&P Section for a period not to exceed one month, until the backlog of cases in the C&P Section was relieved;

- Had been absent from PVAMC for three workdays prior to my return to duty. The reasonable inference to be drawn from Fact 3 is that I had no knowledge that a panel would be meeting later in January to discuss my return to PVAMC;

- During the months that I was employed in the C&P Section, I had the same supervisors, was in the same service, and received the same pay;

- While I was temporarily assigned to the C&P Section, my position in Primary Care was vacant, which created a "critical need" in Primary Care;

- There was never any paperwork generated by the Agency to reflect that there was any formal or informal personnel action associated with the temporary assignment in the C&P Section,

- There was never any evidence provided to me by the Agency that I had violated the *Privacy Act*, and

did not establish triable issues of fact for jury determination to support my claim of retaliation for whistleblower activity. This is a jury question and the MSPB removed this issue from the province of the jury. The MSPB, in reaching its decision, did not properly apply summary judgment principles.

Issue 3

The Appeals Court Panel Erred as a matter of law by impermissibly making factual findings against me (Dr. Wadhwa) where the underlying factual support was disputed

The Appeals Court Panel's perfunctory dismissal of my (Dr. Wadhwa's) retaliation complaint cannot be supported. Neither the MSPB nor the Appeals Court Panel engaged in any analysis of the facts. The Appeals Court Panel simply made the sweeping conclusory statement that *"the Department of Veterans Affairs (DVA, Agency) did not violate the Whistleblower Protection Act (WPA) by reassigning Dr. Wadhwa from the Primary Care Clinic to the Compensation and Pension (C&P) Section of the Philadelphia VA Medical Center (PVAMC)."*

There is no factual basis whatsoever for the Appeals Court Panel to have made these factual findings. The MSPB and the Appeals Court Panel have never identified all the material facts supporting any of these contentions, have never analyzed whether the facts were undisputed or challenged, have never addressed my (Dr. Wadhwa's) specific allegations of improper treatment, harassment and hostility, have never analyzed my (Dr. Wadhwa's) factual allegations, have never concluded that any of my (Dr. Wadhwa's) allegations were non-material, unfounded or without any factual basis, and have never reached any reasoned conclusion that my (Dr. Wadhwa's) allegations did not constitute triable issues of fact.

Lastly, the Appeals Court Panel rejected my (Dr. Wadhwa's) retaliation allegation without even

addressing the retaliation claim and finding that there was no casual connection between my (Dr. Wadhwa's) retaliation complaint and the events that followed shortly thereafter, which events comprised my follow-up retaliation claim.

The MSPB and the Appeals Court Panel failed in their obligation at the summary judgment phase to consider all material factual allegations of mine (Dr. Wadhwa) in a light most favorable to me, including all favorable inferences reasonably drawn from those allegations.

In fact, the MSPB and the Appeals Court Panel essentially avoided addressing my (Dr. Wadhwa's) factual allegations.

Conclusion

Although the Appeals Court Panel affirmed the MSPB's granting of summary judgment, the Appeals Court Panel failed to address my (Dr. Wadhwa's) factual allegations, failed to identify those factual allegations which were not material to the summary judgment analysis, failed to identify the undisputed material facts, failed to analyze the facts in any reasoned fashion and failed to reach a conclusion, based on rigorous and proper legal reasoning, that summary judgment was appropriate and proper.

I (Dr. Wadhwa) request that this Honorable Court grant reconsideration and the matter be remanded for a trial on the merits.

Respectfully submitted,

/s/Dom Wadhwa, M.D.
Dom Wadhwa, M.D., *pro se*
Petitioner

Dated: February 14, 2010

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Exhibit A

United States Court of Appeals for the Federal Circuit

Docket No. 2009-3167

Opinion and Judgment

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3167

DOM WADHWA,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

Dom Wadhwa, of Moorestown, New Jersey, pro se.

Matthew H. Solomson, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent. With him on the brief were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Reginald T. Blades, Jr., Assistant Director.

Appealed from: Merit Systems Protection Board

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3167

DOM WADHWA,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

Petition for review of the Merit Systems Protection Board in PH1221080019-W-1.

DECIDED: November 19, 2009

Before GAJARSA, DYK, and MOORE, Circuit Judges.

PER CURIAM.

Dr. Dom Wadhwa petitions for review of the final decision of the Merit Systems Protection Board ("Board") that denied his request for corrective action sought in his Individual Right of Action ("IRA") appeal under the Whistleblower Protection Act ("WPA"), 5 U.S.C. § 2302(b)(8) (2000). See Wadhwa v. Dep't of Veterans Affairs, 110 M.S.P.R. 615 (M.S.P.B. Mar. 13, 2009) ("Final Decision"). For the reasons stated below, we affirm.

BACKGROUND

Dr. Dom Wadhwa is a Staff Physician at the Philadelphia Veterans Administration Medical Center ("PVAMC"), a Department of Veterans Affairs ("DVA" or "agency") hospital located in Philadelphia, Pennsylvania. On June 9, 2006, Dr. Wadhwa, while working at the Primary Care Clinic, encountered a patient who allegedly walked into his examination room without an appointment. The patient became confrontational, and blocked his exit. Dr. Wadhwa reported this incident to the DVA Office of Resolution Management ("ORM"), including with his report the patient's file containing personal information. In response, his supervisors asked a local Administrative Investigation Board to investigate the possibility of a violation of the Privacy Act, based on Dr. Wadhwa's disclosure of the patient's private information.

On July 23, 2006, Dr. Wadhwa submitted a letter to the DVA Inspector General ("IG") office, describing both the incident on June 9, 2006, and safety problems at the hospital in general. Shortly thereafter, his first-line supervisor, Dr. Murphy, issued a proposed 14-day suspension letter to Dr. Wadhwa based on the alleged violation of the Privacy Act. This proposal was later rescinded and was replaced with a proposed removal by Dr. Wadhwa's second-line supervisor, Dr. Grippey.

In late 2006, Dr. Wadhwa was reassigned from the PVAMC to the Northern Indiana Health Care System in Indiana. That order was rescinded and he was reassigned to the PVAMC due to the unresolved, proposed disciplinary action. On his return, he was

temporarily reassigned to the Compensation and Pension ("C&P") Section of the PVAMC, where patients are examined for purposes of disability claims, rather than to his former clinical position in the Primary Care Clinic, where patients seek general medical care. After Dr. Wadhwa received a letter confirming that his reassignment to the C&P Section was permanent, Dr. Wadhwa filed a complaint with the Office of Special Counsel alleging that his 2007 reassignment from the Primary Care Clinic to the C&P Section was in retaliation for his whistleblowing disclosure protected under the WPA.

Dr. Wadhwa appealed to the Board, and the administrative judge ("AJ") denied Dr. Wadhwa's request for corrective action. Wadhwa v. Dep't of Veterans Affairs, No. PH-1221-08-0019-W-1 (M.S.P.B. Jun. 26, 2008) ("Initial Decision"). In denying the request, the AJ found that: (1) Dr. Wadhwa failed to show that he made protected disclosures on July 23, 2006, when he submitted a memorandum alleging safety violations at PVAMC to the IG; (2) even if Dr. Wadhwa's disclosures were protected, he failed to show that they were a contributing factor in his reassignment from the Primary Care Clinic to the C&P Section; and (3) the agency showed by clear and convincing evidence that it would have reassigned Dr. Wadhwa absent any disclosure. Id.

On petition for review, the Board modified the AJ's initial decision but nevertheless denied Dr. Wadhwa's request for corrective action, holding that: (1) the AJ erred in finding that Dr. Wadhwa's disclosures were not protected; and (2) the AJ erred in finding that Dr. Wadhwa's disclosures were not a

contributing factor in his reassignment; but (3) the AJ correctly found that the agency presented clear and convincing evidence that it would have reassigned Dr. Wadhwa even absent any protected disclosure. See Final Decision. Dr. Wadhwa timely filed this appeal. We have jurisdiction over Dr. Wadhwa's appeal pursuant to 28 U.S.C. § 1295(a)(9).

DISCUSSION

Our scope of review in an appeal from a decision of the Board is limited. Specifically, a decision of the Board must be affirmed unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c); see Dickey v. Off. of Pers. Mgmt., 419 F.3d 1336, 1339 (Fed. Cir. 2005).

In order for the Board to order corrective action in an IRA appeal, the petitioner must show by a preponderance of the evidence that the protected disclosure was a contributing factor to the personnel action. See 5 U.S.C. § 2302(b)(8)(A); Johnston v. Merit Sys. Prot. Bd., 518 F.3d 905, 909 (Fed. Cir. 2008). The burden then shifts to the agency to show by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. See 5 U.S.C. § 1221(e); Marano v. Dep't of Justice, 2 F.3d 1137, 1141 (Fed. Cir. 1993). Here, because the Board determined that Dr. Wadhwa had satisfied his initial burden to show that the disclosure was a contributing factor in the decision to reassign him, we need only review the

Board's determination that DVA satisfied its burden by clear and convincing evidence that it would have taken the same personnel absent the disclosure.

When determining whether the agency has shown by clear and convincing evidence that it would have taken the same personnel action absent the disclosure, the following three factors are considered: (1) the strength of the agency's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated. Carr v. Social Sec. Admin., 185 F.3d 1318, 1323 (Fed. Cir. 1999).

In denying Dr. Wadhwa's request for corrective action, the Board correctly considered the requisite Carr factors and properly evaluated the submitted evidence. First, the evidence in support of the agency's action to reassign Dr. Wadhwa was substantial. The agency's witnesses testified that Dr. Wadhwa was reassigned because (1) there was a large backlog of cases in the C&P Section that had developed due to the Iraq War; (2) Dr. Wadhwa requested that he not be returned to work for Dr. Murphy; (3) Dr. Wadhwa had performance problems and received a large number of patient complaints while working at the Primary Care Clinic, even before the July 23, 2006 report of alleged safety violations; and (4) Dr. Wadhwa had communication and collaboration problems with other staff members at the Primary Care Clinic. The witnesses testified that Dr. Wadhwa was better suited to work in the C&P Section rather than Primary Care, because a

C&P physician has less contact or collaboration with Dr. Murphy and other staff. Significantly, the agency presented clear evidence that there were disputes between Dr. Wadhwa and his supervisors over his alleged performance with patient care prior to the July 23, 2006 report of alleged safety violations. Initial Decision at 17.

With respect to the second factor, the AJ found "very little motivation for all four managers to prevaricate and . . . for bias against [Dr. Wadhwa] based on any improper reason." Initial Decision at 16. Specifically, she found that "[n]o manager seems to have been affected by the . . . disclosures. No manager appeared to be concerned about the disclosures because the issues were not new or unknown, and for Drs. Murphy and Grippey, not even within their direct authority to implement." Id. at 12. While Dr. Wadhwa argues that the testimony of the agency's witnesses was lacking and unsubstantiated, he points to no contrary evidence. We note that the Board did not specifically discuss whether the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated. However, it appears that neither party presented evidence with respect to this factor. Given that no evidence was introduced on the third Carr factor, the Board's failure to discuss it was at most harmless error. Substantial evidence supports the Board's finding that the agency showed by clear and convincing evidence that it would have reassigned Dr. Wadhwa absent the disclosure based on the analysis of the first two factors.

Dr. Wadhwa contends that "the AJ erred in crediting the testimonies of the Agency's witnesses without any supporting documentation over [Dr. Wadhwa's] testimony and documentation" and that "the AJ made demeanor-based credibility findings without sufficiently sound reasons for doing so." As the finder of fact, the AJ is in a unique position to make credibility determinations and evaluate the evidence on the record before her. Accordingly, the AJ's credibility determinations are "virtually unreviewable," Hambsch v. Dep't of Treasury, 796 F.2d 430, 436 (Fed. Cir. 1986), and we see no basis to overturn the Board's finding here that the agency's witnesses were credible.

Dr. Wadhwa also contends that he was precluded from presenting witnesses to support his case. This argument is without merit. The proffered testimony of agency witnesses and the request for further cross-examination of agency witnesses were untimely, and Wadhwa in any event has failed to establish that this testimony was relevant or non-cumulative. On the facts of this case, we do not find any abuse of discretion by the AJ in denying the admission of the proffered testimony.

CONCLUSION

We hold that the Board's findings are supported by substantial evidence and therefore affirm the Board's decision that DVA did not violate the WPA by reassigning Dr. Wadhwa from the Primary Care Clinic to the C&P Section of the PVAMC.

No costs.

Exhibit B

United States Court of Appeals for the Federal Circuit

Docket No. 2009-3167

Petition for Panel Rehearing DENIED

and

Petition for Rehearing *en banc* DENIED

United States Court of Appeals for the Federal Circuit

2009-3167

DOM WADHWA,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Petition for review of the Merit Systems Protection Board in PH1221080019-W-1.

ORDER

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc, and the same hereby is, DENIED.

The mandate of the court will issue on February 3, 2010.

FOR THE COURT,

Dated: 01/27/2010

/s/ Jan Horbaly
Jan Horbaly, Clerk

cc: Dom Wadhwa
Matthew H. Solomson

WADHWA V VA, 2009-3167
(MSPB-PH1221080019-W-1)

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3167

DOM WADHWA,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

Judgment

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S). PH1221080019-W-1

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED November 19, 2009 /s/ Jan Horbaly
Jan Horbaly, Clerk

ISSUED AS A MANDATE: February 3, 2010

Exhibit C

United States Court of Appeals for the Federal Circuit

Docket No. 2009-3169

Judgment without an Opinion issued by the Court for this Appeal

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3169

DOM WADHWA,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

Dom Wadhwa, of Moorestown, New Jersey, pro se.

Lauren A. Weeman, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent. With her on the brief were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Reginald T. Blades, Jr., Assistant Director.

Appealed from: Merit Systems Protection Board

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3169

DOM WADHWA,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

Judgment

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S). PH1221080502-W-1

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam (GAJARSA, DYK, and MOORE, Circuit Judges).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED November 19, 2009 /s/ Jan Horbaly
Jan Horbaly, Clerk

Exhibit D

United States Court of Appeals for the Federal Circuit

Docket No. 2009-3169

Petition for Panel Rehearing DENIED

and

Petition for Rehearing *en banc* DENIED

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc, and the same hereby is, DENIED.

The mandate of the court will issue on February 3, 2010.

FOR THE COURT,

Dated: 01/27/2010

/s/ Jan Horbaly
Jan Horbaly, Clerk

cc: Dom Wadhwa
Lauren A. Weeman

WADHWA V VA, 2009-3169
(MSPB-PH1221080502-W-1)

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3169

DOM WADHWA,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

Judgment

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S). PH1221080502-W-1

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam (GAJARSA, DYK, and MOORE, Circuit Judges).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED November 19, 2009 /s/ Jan Horbaly
Jan Horbaly, Clerk

ISSUED AS A MANDATE: February 3, 2010

Appendix Volume I
for Docket No. 2009-3167
(Appendix One, Appendix Two, and Appendix Three)

Appendix One

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 33

Docket No. PH-1221-08-0019-W-1
Dated March 13, 2009
(Wadhwa1)

Final Opinion & Order

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 33

Docket No. PH-1221-08-0019-W-1

Dom Wadhwa,

Appellant,

v.

Department of Veterans Affairs,

Agency.

March 13, 2009

Dom Wadhwa, Moorestown, New Jersey, pro se

Stacey Conroy, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Neil McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the June 26, 2008 initial decision (ID) that denied his request for corrective action in his individual right of action (IRA) appeal. For the reasons discussed below, we find that the PFR does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the ID as

MODIFIED by this Opinion and Order, still DENYING the request for corrective action.

BACKGROUND

¶2 The appellant, a Physician at the agency's Philadelphia Veterans Administration Medical Center (PVAMC), filed an IRA appeal on October 10, 2007. He enclosed the Office of Special Counsel's (OSC's) September 27, 2007 letter informing him that he had the right to seek corrective action from the Board. Initial Appeal File (IAF), Tab 1. The administrative judge (AJ) found that the Board has jurisdiction over the appeal, but denied the appellant's request for corrective action. *Id.*, Tab 59.

¶3 In denying the appellant's request for corrective action, the AJ first found that the appellant failed to show that he made protected disclosures on July 23, 2006, when he submitted a letter to the agency's Inspector General (VA IG) alleging safety violations at PVAMC, following an incident during which he was threatened by a patient who entered his examination room uninvited. ID at 3, 7-11. The AJ then found that, even if the appellant's disclosures were protected, he did not show that they were a contributing factor in his reassignment from the Primary Care Clinic to the Compensation and Pension (C&P) Section on January 22, 2007. *Id.* at 4, 11-14. Finally, the AJ found that, even if the disclosures were a contributing factor, the agency showed by clear and convincing evidence that it would have reassigned the appellant, anyway. *Id.* at 14-18.

¶4 The appellant has filed a PFR. PFR File, Tab 1. The agency has not responded to the PFR.

ANALYSIS

The AJ erred in finding that the appellant's disclosures were not protected.

¶5 To prevail on a claim under the Whistleblower Protection Act (WPA), an appellant must prove by preponderant evidence that he disclosed information he reasonably believed evidenced, inter alia, a substantial and specific danger to public health or safety.* 5 U.S.C. § 2302(b)(8)(A); *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 12 (2004). The AJ correctly found that the appellant raised a specific threat to public health and safety. ID at 10.

The appellant complained of numerous specific alleged security deficiencies, and drew a reasonable causal relationship between them and at least two incidents where he or another medical professional was threatened with serious injury by patients. IAF, Tab 1, Ex. A. The AJ did not determine whether the threat identified by the appellant was substantial.

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*Although she erred in stating that gross mismanagement requires an "element of blatancy," the AJ correctly concluded that the appellant's July 23, 2006 letter did not disclose gross mismanagement. *See* IAF, Tab 59 at 9; *Swanson v. General Services Administration*, 110 M.S.P.R. 278, ¶ 11 (2008); *Tatsch v. Department of the Army*, 100 M.S.P.R. 460, ¶ 12 (2005) (noting that the U.S. Court of Appeals for the Federal Circuit has abolished the "blatancy" requirement).

We find, however, that the prospect of bodily injury to hospital staff is sufficiently serious to satisfy that prong of the statutory standard. *See Chambers v. Department of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008) (stating that "the nature of the harm – the potential consequences – affects the substantiality of the danger").

¶6 Notwithstanding her finding that the appellant's alleged safety concerns were sufficiently specific, the AJ nonetheless found that the appellant's July 23, 2006 letter was not a protected disclosure under *Meuwissen v. Department of the Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000). ID at 7-11. The AJ relied on *Meuwissen* for the proposition that a disclosure of something that is already publicly known is not a protected disclosure under the WPA. *Id.* at 8-9. In support, the AJ noted that the issues the appellant raised in the letter had been discussed and investigated at PVAMC for several years, culminating in the creation of a task force that made certain recommendations, and that some changes had been made. *Id.* at 8-10. The AJ also found that "many of the safety devices or strategies, or lack thereof, would have been apparent to anyone who walked into the hospital, *e.g.*, guards, cameras, metal detectors, room configurations, etc." *Id.* at 9.

¶7 We find that the AJ erred in relying on *Meuwissen* to find that the appellant's July 23, 2006 disclosures were not protected because PVAMC's staff and management were aware of the safety issues. An employee's decision to go outside the chain of command to correct a problem that local management has failed to address is a form of protected disclosure under the WPA,

notwithstanding that local employees and management were aware of the problem. *See Grubb*, 96 M.S.P.R. 377, ¶¶ 27-28 (holding that an employee's complaint to the agency IG that local agency management violated the law was a protected disclosure); *Johnson v. Department of Health & Human Services*, 93 M.S.P.R. 38, ¶¶ 13-14 (2002) (holding that an employee who went to the agency IG after making numerous complaints to his supervisors that he believed were ignored made a protected disclosure under the rule that where an employee "goes outside the chain of command because he feels that those officials are 'unresponsive,' his disclosures are protected"); *Askew v. Department of the Army*, 88 M.S.P.R. 674, ¶¶ 7-9 (2001) (holding that an appellant's statements to the agency IG were protected disclosures, notwithstanding that the facility's management had previously detected the same problem identified by the appellant, but failed to act to the appellant's satisfaction).

¶8 We also find that the AJ erred on the facts in relying on *Meuwissen* to find that the appellant's July 23, 2006 disclosures were not protected under the "publicly known" exception. As previously noted, the AJ stated that issues that the appellant raised in his letter were publicly known because "many of the safety devices or strategies, or lack thereof, would have been apparent to anyone who walked into the hospital, *e.g.*, guards, cameras, metal detectors, room configurations, etc." ID at 9. However, there was no evidence that members of the public generally, as opposed to the potentially dangerous patients from whom the appellant sought protection, had access to examination rooms. In addition, many of the other

alleged safety deficiencies raised by the appellant would not have been visible to the public, such as the failure to provide panic buttons in examination rooms, patient criminal background information to treating physicians, special VA Police Officer protection in cases where a patient who was known to be potentially violent arrived for treatment, and warnings on the charts of potentially violent patients. IAF, Tab 1, Ex. A.

¶9 Therefore, the appellant here did more than merely restate observable facts. Rather, as a physician practicing at the facility, he provided a perspective not discernable to members of the visiting public by recognizing the potential threat to medical providers' safety that the lack of security caused. For instance, the appellant complained that the examination rooms' furniture was arranged such that a doctor could be pinned against the wall by a patient, that the absence of a second exit door in the rooms could trap a doctor, and that the rooms lacked panic buttons. IAF, Tab 1, Ex. A. A member of the public would not necessarily recognize the potential danger posed by these factors. Consequently, even assuming that all of the safety issues raised by the appellant were discernable by the public, the public would not have had the additional information necessary to recognize the threat to the health and safety of the medical staff posed thereby, and therefore could not effectuate the WPA's remedial purpose of encouraging that the threat be disclosed to someone in a position to correct it.

¶10 In that regard, we further find that the AJ erred in interpreting the "publicly known" test too restrictively. In *Meuwissen*, the appellant, an administrative judge, first complained about, and then issued an opinion inconsistent with, an agency's statutory interpretation that had been articulated in published decisions. 234 F.3d at 11. The court explained that the WPA's purpose to "correct" abuses is not served by "encourag[ing] employees to disclose the illegality of such decisions, which are known and readily redressable by appeal." *Id.* at 13-14. In *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1347-50 (Fed. Cir. 2001), as in *Meuwissen*, the court explained the requirement that a disclosure be "unknown" in the context of the legislative intent to encourage employees to make disclosures so that wrongdoing can be remedied. Thus, the court opined that the statutory purpose of encouraging disclosures that are likely to remedy a wrong is not served by making a "disclosure" to the wrongdoer himself. 263 F.3d at 1350. Similarly, in *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996), the court held that an employee's criticism directed to the wrongdoers themselves was not whistleblowing because such disclosures do not serve the WPA's purpose of remedying wrongs. But in *Horton*, the court did not even address whether the information conveyed by the employee was unknown or known. *See also Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652,¶¶ 18-20 (2004) (analyzing the "disclosure" requirement based on whether the complaints were made to an individual other than the policy maker, without considering whether the recipient might also already have been aware of the allegedly dangerous policy).

¶11 In sum, the U.S. Court of Appeals for the Federal Circuit in *Meuwissen*, *Huffman*, and *Horton* examined whether the statutory purpose of affording a remedy for alleged government wrongdoing would be served in determining that the subject statements were not "disclosures" within the meaning of the WPA. In contrast, the remedial purpose of the WPA is furthered by encouraging employees to bring to the attention of agency IGs alleged threats to safety that are ignored by local management, and based upon facts which, even if known to the public, do not necessarily indicate a safety threat without also considering additional information not publicly known.

The AJ erred in finding that the appellant's disclosures were not a contributing factor in his reassignment.

¶12 To prevail on a claim under the WPA, an appellant must also prove by preponderant evidence that his disclosure was a contributing factor in a personnel action. 5 U.S.C. § 2302(b)(8)(A); *Grubb*, 96 M.S.P.R. 377, ¶ 12. As the AJ found, the appellant's reassignment was a personnel action. 5 U.S.C. § 2302(a)(2)(A)(iv); ID at 7. The most common way of proving the contributing factor element is the "knowledge/timing test." Under that test, an appellant can prove the contributing factor element through evidence that the official taking the personnel action knew of the whistleblowing disclosure and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶

19 (2008). "Once an appellant has satisfied the knowledge/timing test, he has demonstrated that a protected disclosure was a contributing factor in a personnel action. *Id.*, ¶ 20.

¶13 Here, the AJ erred in concluding that the appellant's disclosures were not a contributing factor in the agency's decision to reassign him, based on an analysis of all of the relevant evidence, despite finding that the managers who reassigned him were aware of his disclosure and that he was reassigned only 6 months after submitting the July 23, 2006 letter to the VA IG. ID at 11-14. Six months is well within the range of time between a disclosure and a personnel action from which an inference of causation arises. *See Gonzalez*, 109 M.S.P.R. 250, ¶ 20 (finding that a time period of slightly more than 1 year satisfied the timing test, and citing cases that also so held); *Cosgrove v. Department of the Navy*, 59 M.S.P.R. 618, 623 n.5 (1993) (citing legislative history stating that a 1-year period normally would support an inference of reprisal). Because the appellant satisfied the knowledge/timing test, the AJ should not have considered any further evidence on the issue. *Gonzalez*, 109 M.S.P.R. 250, ¶ 20. Any contrary evidence may be considered in the context of the agency's burden to show by clear and convincing evidence that it would have taken the adverse action notwithstanding the appellant's protected disclosures. An AJ's consideration of all of the relevant evidence when determining whether the whistleblowing was a contributing factor in the personnel action has the effect of shifting to the appellant a burden that the Board has held should be borne by the agency.

The AJ correctly found that the agency presented clear and convincing evidence that it would have reassigned the appellant even absent any protected disclosure.

¶14 The Board will order corrective action in an IRA appeal where an appellant shows by preponderant evidence that he engaged in whistleblowing and that the whistleblowing was a contributing factor in the decision to take a personnel action, unless the agency shows by clear and convincing evidence that it would have taken the personnel action even absent the whistleblowing. *Mangano v. Department of Veterans Affairs*, 109 M.S.P.R. 658, ¶ 19 (2008). In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board considers the strength of the agency's evidence in support of its action, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision, and any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated. *Id.*

¶15 The AJ correctly concluded that the agency presented clear and convincing evidence that it would have reassigned the appellant even absent any protected disclosures. In that regard, the AJ relied on the credibility of the agency's witnesses, as demonstrated by the straighforwardness and consistency of their statements, their calm and assured demeanor, and the absence of any

motivation for them to prevaricate or of any bias against the appellant for any improper reason. ID at 15-16. The AJ was satisfied that the unrebutted testimony of these witnesses established that the appellant was reassigned (1) to address a backlog in the department to which he was assigned that had developed during his absence from the PVAMC; (2) in response to the appellant's own request that he not be returned to work for the Director of the Primary Care Clinic; (3) in light of the large number of patient complaints the appellant had received while working in his original department; and (4) to prevent the communication and collaboration problems that had arisen between the appellant and the nurses and other staff at his original department. *Id.* Significantly, there was evidence that agency management believed that the appellant had performance problems before he sent his letter to the VA IG. *Id.* at 17.

¶16 Thus, notwithstanding the AJ's errors in the first two prongs of the WPA analysis, she correctly found, based on a detailed discussion of the evidence and a thorough and persuasively reasoned analysis, that the agency would have reassigned the appellant notwithstanding his protected disclosures. Therefore, she correctly denied his request for corrective action under the WPA.

ORDER

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

Appendix Two

United States Court of Appeals for the Federal Circuit

Informal Brief of Petitioner
(Wadhwa1)

Docket No. 09-3167

May 12, 2009

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, NW
WASHINGTON, DC 20439

Dom Wadhwa, M.D., *pro se* Docket No. 09-3167
Petitioner

MSPB Docket No.
v. PH-1221-08-0019-W-1
Filed October 10, 2007

Department of Veterans Affairs, (Wadhwa1)
Respondent

INFORMAL BRIEF OF PETITIONER
(Wadhwa1)

I, Petitioner, Dom Wadhwa, M.D. ("Dr. Wadhwa"), respectfully file an Informal Brief of Petitioner with this Honorable Court for the Merit Systems Protection Board (MSPB, Board) Docket No. PH-1221-08-0019-W-1, filed on October 10, 2007.

The following are the responses to the questions for Informal Brief of Petitioner:

Read the Guide for Pro Se Petitioners and Appellants before completing this form. Attach a copy of the initial and final decision or order of the Merit Systems Protection Board or arbitrator. Answer the following questions as best you can. Your answers should refer to the decision or order you are appealing where possible. Use extra sheets if needed.

1. Have you ever had another case in this court? Yes; In a United States district court? Yes; In the Equal Employment Opportunity Commission? Yes; If so, identify each case.

a. The United States Court of Appeals for the Federal Circuit Docket Number: 2008-3176, -3177 for MSPB Docket Numbers: PH-0752-07-0313-I-1 and PH-3443-07-0638-I-1 (Writ for Certiorari Docket No. 08 - 0702 for this appeal to The Supreme Court of the United States);
b. The United States Court of Appeals for the Third Circuit Docket No. 09-1835 for Civil Action No. 06-4362;
c. The U.S. District Court For The Eastern District of Pennsylvania Consolidated Civil Action No. 07-3301(Consolidated Civil Action Nos. 07-2677, 07-2997, 07-2750, and 07-3301);
d. Remanded EEO Case Nos. 200H-0642-2005100051, 200H-0642-2005101684, 200H-0642-05100781, 200H-0642-005100161, 200H-0642-2005100318;
Request for Reconsideration for EEO Case No. 200H-0642-2008102059; Appeal pending on Final Agency Decision for EEO Case No. 2004-00642-2008100615.[9]

The 'Complainant's Response To The Agency Response to Complainant's Response to Show Cause' letter to the EEOC, dated December 7, 2007, **(Exhibit S)** explains some of the reasons as to why I have not had an EEOC Hearing since filing of my

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[9] I filed my first EEO complaint on December 20, 2004. To date, I have not had a hearing for any of the EEO Cases listed above.

first discriminatory EEO complaint on December 20, 2004.

2. Did the MSPB or arbitrator incorrectly decide or fail to take into account any facts? Yes; If so, what facts? (Refer to paragraph 7 of the Guide.)

The Opinion and Order (Wadhwa1)[10] issued by the Merit Systems Protection Board (Board), dated March 13, 2009 **(Exhibit P)** was based on review of an *untruthful and unsubstantiated* Initial Decision by Honorable Elizabeth D. Milligan, Administrative Judge (AJ), U.S. Merit Systems Protection Board, dated June 26, 2008. **(Exhibit M)**

In the March 13, 2009 Opinion and Order (Wadhwa1), the Board stated that the AJ relied on the credibility of the Agency's witnesses, as demonstrated by the straightforwardness and consistency of their statements, their calm and assured demeanor, and the absence of any motivation for them to prevaricate or of any bias against me for any improper reason. I assert that the AJ erred in crediting the testimonies of the Agency's witnesses without any supporting documentation over my testimony and documentation. The AJ made demeanor-based credibility findings without sufficiently sound reasons for doing so.

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[10] On March 13, 2009, the Board issued an Opinion and Order for two appeals on the same day. The first Opinion and Order was for MSPB Docket No. PH-1221-08-0019-W-1 (Wadhwa1), filed on October 10, 2007, and the second Opinion and Order was for MSPB Docket No. PH-1221-08-0502-W-1 (Wadhwa2), filed on July 3, 2008.

Also, it should be noted that the Board based its decision on the fact that the AJ was satisfied with the unrebutted testimony of these Agency's witnesses to establish that I was reassigned:

(1) to address a backlog of cases in the Compensation and Pension (C&P) Section to which I was assigned that had allegedly developed during my absence (for three workdays) from the PVAMC;

(2) in response to the my own request that I not be returned to work for the Director of the Primary Care Clinic;

(3) in light of the large number of patient complaints I had allegedly received while working in my original assignment in Primary Care;

(4) to prevent the communication and collaboration problems that had allegedly arisen between the nurses and other staff in Primary Care and me;

(5) Significantly, the Agency officials at PVAMC believed that I allegedly had performance problems before I sent my letter to the VA IG.

On the contrary, the AJ refused to permit me to rebut the testimonies by the Agency's witnesses and abruptly ended the Hearing on May 29, 2009.

The AJ was *incorrect* in being satisfied that the unrebutted testimony of the Agency's witnesses established that I was *permanently* reassigned to the C&P Section for other reasons, absent the protected disclosure. The testimonies of the Agency's witnesses

were not supported by facts. It should be noted that the Agency's witnesses had not one, but an array of five untruthful and unsubstantiated reasons, as listed above, for why I was reassigned to the C&P Section. The Agency's witnesses appeared to believe that the more alleged reasons they could identify, the better the probability that the AJ would believe their testimonies.

The above unrebutted testimonies by the Agency's witnesses are untrue because:

1. The backlog in the C&P Section lasted for less than 30 days and over two years later, I am still assigned to the C&P Section. Also, my absence from PVAMC was for only three workdays and my absence had absolutely nothing to do with the backlog in the C&P Section. In her decision, the AJ made it appear that the backlog developed over the three workdays I was at VA NIHCS.

2. I had requested a clinical position in the Emergency Department at PVAMC, where the Director of the Emergency Department would be my immediate supervisor. Instead, I was *assigned* a non-clinical position in the C&P Section with Dr. Murphy, the Director of Primary Care, as my supervisor. Thus, my request to allow me to not work under Dr. Murphy was denied. It should be noted that in the C&P Section, Dr. Murphy is still my supervisor and he writes and signs my performance appraisal ratings.

Also, I did not request to be assigned to a non-clinical area. Therefore, it is obvious that my non-clinical assignment under Dr. Murphy's supervision was in

retaliation for my whistleblower activity, and the stated reasons by the Agency's witnesses for placing me in the C&P Section are merely *pretext*.

3. Dr. Murphy with the assistance of Kathleen Craige, R.N., Nurse Manager in Primary Care, *deliberately* transferred to me the care of non-complaint, belligerent, and hostile patients of other Primary Care providers who were not satisfied with their VA medical care and who had administrative issues that were outside the scope of Primary Care clinical practice. This was the reason the original providers no longer wished to care for these patients. The Agency officials *falsely* represented that the complaints generated by these patients were due to the medical care I had offered to them.

4. There have been no communication problems whatsoever between the nurses and other staff in Primary Care and me. These were *untruthful* and *unsubstantiated* statements made by the Agency's witnesses that served as *pretext* for the real reason I was assigned to a non-clinical position in the C&P Section.

There have never been problems of communication between the nursing staff and me during my over twenty-two years of employment as an attending physician in Primary Care within the Department of Veterans Affairs. The AJ refused to allow me to call additional witnesses to provide testimony that these statements made by the Agency's witnesses were untrue. The AJ did not request documentation from the Agency's witnesses, regarding the alleged communication problems between the nurses and other staff in Primary Care and me. The AJ

erroneously accepted at face value the untruthful and unsubstantiated statements of the Agency's witnesses.

5. Also, there was no evidence provided by the Agency's witnesses to show that I had performance problems, prior to or after I sent the protected disclosure letter to the VA IG on July 23, 2006.

On March 23, 2009, I filed my Request for Reconsideration of the Board's March 13, 2009 Opinion and Order (Wadhwa1) that was based on *untruthful and unsubstantiated* information. **(Exhibit Q)**

On March 31, 2009, the Board issued a letter which denied my request for reconsideration for the Board's March 13, 2009 Opinion and Order (Wadhwa1). **(Exhibit R)**

Statement of Facts

The facts and events that led to my appeal to the Board on October 10, 2007, are as follows.

On January 25, 2005, the Agency officials at PVAMC[11] issued a *reprimand* to me for declining to sign a blank pre-employment physical examination form to be completed by my supervisors for a belligerent, hostile alcoholic and substance abuse patient for a position as a substitute teacher to teach young children in the Philadelphia School District. The Agency officials offered me no explanation for the issuance of this reprimand. This reprimand was issued to me in retaliation for filing of an EEO complaint regarding this patient incident on December 20, 2004.[12]

In February 2005, I filed an EEO complaint with the VA Office of Resolution Management, regarding the *reprimand* issued to me by Dr. Murphy and by Dr. Grippi on January 25, 2005.

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[11] The Agency officials at PVAMC that were involved in the issuance of the reprimand and the subsequent personnel actions against me, are as follows: John Murphy, M.D., Director of Primary Care, Michael Grippi, M.D., former Chief of Medicine Service, Martin Heyworth, M.D., Chief of Staff, Kathleen Craige, RN, Primary Care Nurse Manager, Margaret O'Shea-Caplan, Associate Director of Finance, Carol Patterson, Vice President for Medicine Service, and Michael Sullivan, former Medical Center Director.

[12] Please note: To Date, I have not had a single EEOC Hearing on my EEO cases, since I filed my first EEO complaint on December 20, 2004.

On December 7, 2005, in retaliation for the December 2004 and the February 2005 EEO complaints, my first and second level supervisors, Dr. Murphy and Dr. Grippi, issued an *untruthful and unsubstantiated* annual proficiency report to me.[13]

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[13] Dr. Murphy's and Dr. Grippi's Performance Appraisal Narrative written about me on December 7, 2005, and included as part of my annual proficiency report, contained untruthful and unsubstantiated statements for the FY 05 Rating Period. It stated, as follows:

(a) "A large proportion of his [Dr. Wadhwa's] patients are dissatisfied with the care he provides";

(b) "He receives many complaints through the Patient Advocate's office and other venues on a regular basis";

(c) "Many patients have requested to be transferred to other providers";

(d) "Nursing staff, the Patient Advocate, administrative personnel, and his supervisor spend undue amounts of time trying to deal with his unsatisfied patients";

(e) "Patients have described him as 'arrogant' and 'uncaring,' and say that he 'doesn't listen' and that he 'talks down to me'";

(f) "Because of the ongoing loss of patients, he has been unable to attain a full panel of patients despite being a full-time physician in this practice for over 4 years";

(g) "I [Dr. Murphy] have observed that patients with the most difficult problems are most likely to leave his [Dr. Wadhwa's] practice";

(h) "Patients have told me [Dr. Murphy] that Dr. Wadhwa actually has encouraged them to request another provider";

(i) "Other physicians in the practice complain that they have to pick up his [Dr. Wadhwa's] unsatisfied patients";

(j) "He [Dr. Wadhwa] has a smaller panel consisting of less difficult patients because of

the continues emigration of complex patients from his practice";

(k) "He [Dr. Wadhwa] continuously expressed an unwillingness to supervise and assist nurse practitioners in the practice";

(l) "[Dr. Wadhwa's] unwillingness to supervise the Nurse Practitioners in the practice";

(m) "When given a choice, the nurse practitioners choose not to discuss clinical issues with him [Dr. Wadhwa] as he is rarely very helpful to them"

(n) "Nurse practitioners have been unwilling to accept him [Dr. Wadhwa] as their supervisory physician because they think he is unhelpful and does not treat them with respect in the practice";

(o) "Because of this, the responsibility for supervising and assisting nurse practitioners in the practice falls disproportionately on the other physicians";

(p) "Many patients complain that he [Dr. Wadhwa] refuses to complete administrative forms for them, even though Departmental policy clearly states that this is one of the responsibilities of a primary care provider";

(q) "A number of consultant services complain that he [Dr. Wadhwa] continues to make inappropriate referrals to their service..... and making referrals before completing steps that should be done in primary care";

(r) "He [Dr. Wadhwa] will not listen when they [consultants] advise him on the appropriate procedures";

(s) "He [Dr. Wadhwa] sends many patients with erectile dysfunction to the Urology clinic without following established clinical guidelines before referral";

(t) "The pain management service has reported that he [Dr. Wadhwa] will not follow their recommendations after they see his patients";

(u) "Rehabilitation service complains that he [Dr. Wadhwa] sends patients to them to have forms completed which is generally completed by Primary Care physicians";

(v) "He [Dr. Wadhwa] frequently does not respond in a timely fashion to email and phone messages";

(w) "Dr. Wadhwa has isolated himself from his colleagues and most of his co-workers";

(x) He [Dr. Wadhwa] is generally unwilling to accept any advice or input from colleagues or his supervisor";

(y) He [Dr. Wadhwa] frequently speaks in angry tones or raised voice if anyone questions his decisions in any way";

(z) "He [Dr. Wadhwa] has frequently refused to meet with his supervisor, insisting that he [Dr. Wadhwa] wants to have his lawyer with him in order to meet";

(aa) "Dr. Wadhwa has extremely poor levels of patient satisfaction and his patients feel they are treated in a disrespectful manner";

(bb) "He [Dr. Wadhwa] engages in a number of practices which systematically limit the complexity and size of his practice, thus shifting more difficult work to his colleagues";

(cc) He [Dr. Wadhwa] does not relate in a professional manner with his supervisor or his peers";

(dd) "His [Dr. Wadhwa's] behaviors have been largely detrimental to the functioning of the practice and the morale of his co-workers"; and

(ee) "He [Dr. Wadhwa] has been unwilling to accept any input to improve his performance."

Dr. Murphy and Dr. Grippi did not provide me with documented evidence to support the above statements they recorded in this annual proficiency report. Dr. Murphy stated to me at the time he gave me this annual proficiency report that he does not have to provide me with documented evidence.

Dr. Murphy's and Dr. Grippi's *untruthful and unsubstantiated* Performance Appraisal Narrative written about me on December 7, 2005 was *rescinded* sometime in 2007 by the Agency officials at PVAMC as an '*administrative error*' - continued as a footnote on the previous page.

In June 2006, with the assistance of Margaret O'Shea-Caplan, Associate Director of Finance, Kathleen Craige, RN, Primary Care Nurse Manager, Dr. Murphy, and Dr. Grippi, as the Agency officials at PVAMC, attempted to make charges of alleged *misconduct* and alleged *patient abuse* against me for the June 9, 2006 patient incident, when I was trapped in an examination room by a belligerent, hostile patient who threatened me with severe bodily harm.

On July 23, 2006, I contacted the VA Office of the Inspector General (VA IG) regarding the June 9, 2006 patient incident and the safety issues related to this incident at PVAMC.

It should be noted that Michael Sullivan, former Medical Center Director at PVAMC ordered Dr. Murphy and Dr. Grippi to **rewrite** this annual proficiency report as fully satisfactory in January of 2007. Dr. Murphy and Dr. Grippi did not do this. In the MSPB hearing, Case No. PH 1221-08-0019-W-1, on May 29, 2008, the Agency's attorney stated that this annual proficiency report was ***rescinded*** sometime in 2007 due to an 'administrative error' in issuance of this report. I was never informed of this personnel action by the Agency officials at PVAMC.

On July 26, 2006, the Agency officials at PVAMC issued a proposed *fourteen (14) day suspension* to me for an alleged *Privacy Act violation*, which I did not commit.

On August 30, 2006, the Agency officials at PVAMC fully *rescinded* the proposed fourteen-day suspension and then they issued a *proposed removal* action of me for the same alleged *Privacy Action violation*.[14]

On October 11, 2006, I presented oral and written responses to Michael Sullivan, former Medical Center Director at PVAMC, as to why I did not violate the Privacy Act. At the end of this meeting, Mr. Sullivan approved and signed my transfer papers to the VA Northern Indiana Health Care System (VA NIHCS), effective October 15, 2006.

On October 26, 2006, I was placed on Administrative Leave by VA NIHCS for "unresolved employment issues at PVAMC" and I was ordered not to report for duty until further notice.

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[14] The Agency officials at PVAMC retaliated against me for my protected disclosure to the VA IG on July 23, 2006 by a proposed fourteen day suspension of me on July 26, 2006, within three days of the protected disclosure, followed by a proposed removal from my employment on August 30, 2006, within five weeks of the protected disclosure based on *false* charges of an alleged *Privacy Act violation*, and then my eventual *permanent* reassignment to the C&P Section on January 22, 2007, within five months of my protected disclosure based on a *false* and *inaccurate* performance appraisal rating from December 7, 2005.

On December 4, 2006, Nevin Weaver, the Chief Management Support Officer at the VA Central Office in Washington, D.C., issued a Decision Memorandum to the VA Deputy Under Secretary for Health for Operations and Management, in which Mr. Weaver recommended I return to PVAMC due to my 'unsatisfactory performance and unacceptable conduct' while at PVAMC.

On December 26, 2006, I received a certified letter, dated December 19, 2006, entitled "Notice of Directed Reassignment" issued by William F. Feeley, the VA Deputy Under Secretary for Health for Operations and Management. This order transferred me from VA NIHCS back to PVAMC.[15]

In January 2007, I was demoted by the Agency officials at PVAMC, with a drop in my annual salary and denial of my performance pay in Primary Care.[16]

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[15] This order was based once again on *untruthful* and *erroneous* information provided to Mr. Feeley by the Agency's witnesses. Mr. Feeley, in making his decision, was *deliberately* misled by the Agency officials at PVAMC. Mr. Feeley was misinformed by the Agency officials at PVAMC that I had voluntarily departed from PVAMC to VA NIHCS to "escape a pending disciplinary action at PVAMC." This is not the truth.

[16] In January 2007, upon my involuntary assignment to the nonclinical position in the C&P Section at PVAMC, I was given a corresponding drop in salary of $2,257 and I was denied my performance pay of $5,000 for FY 06 by my immediate supervisors, Drs. Murphy and Grippi, after being away from PVAMC and at NIHCS for just three workdays. Also, in my case, the assignment to a nonclinical position in the C&P section by a ten member panel at PVAMC was involuntary on my part and it was based on a *critical need* for the Agency, and therefore, it is was *pretextual* and is appealable.

On January 21, 2007, I was removed from my clinical assignment in Primary Care and placed in a nonclinical assignment in the Compensation & Pension (C&P) Section.

On January 25, 2007, I received a ***second proposal*** by Agency officials at PVAMC for my *removal* from VA employment. The Agency officials at PVAMC offered me **no** explanation for the issuance of this *proposed removal* from my VA employment.

In the Spring of 2007 (on an unspecified date), Agency officials convened a Local Administrative Investigation Board (AIB) in an attempt to falsely charge me with alleged *patient abuse* for a patient incident on June 9, 2006. [17]

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[17] The Agency officials at PVAMC convened a *local* AIB in the Spring of 2007 (date unknown), regarding my alleged *misconduct* during the June 9, 2006 patient incident when I was trapped in an examination room by a belligerent hostile patient, who threatened me with *severe* bodily harm. The Agency officials at PVAMC have refused to provide me with the findings of fact report of this investigation.

On March 13, 2007, the Agency officials convened a National Administrative Investigation Board (AIB) to investigate my alleged professional misconduct at PVAMC prior to my transfer to VA NIHCS.[18]

On April 3, 2007, the Agency officials at PVAMC issued to me a reprimand based **not** on conduct or performance for an alleged *Privacy Act violation* that was used as *pretext* to propose a fourteen day suspension of me on July 26, 2006, followed by a proposed removal of me from my employment on August 30, 2006. The Agency officials at PVAMC offered me **no** explanation for the issuance of this reprimand.

On June 26, 2007, the Agency officials at PVAMC ordered my *False Arrest* for alleged theft of VA property (for taking my personal items to my car that I had brought into the medical center earlier the same day, three days prior to my *False Arrest*, on June 23, 2007), and this was immediately followed by restriction of my access to the medical center and VA Police surveillance of my daily activities via a video surveillance camera and a large clock placed in the

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[18] On March 13, 2007, the Agency officials convened a *national* Administrative Investigation Board (AIB) to investigate my alleged *misconduct* at the time of my departure from PVAMC to VA NIHCS in October 2006. The Agency officials at PVAMC have refused to provide me with the findings of fact report of this investigation. I assert that the Agency officials at PVAMC have refused to provide me with the findings of fact reports of the *national* and the *local* AIBs, because the *false* allegations brought against me by these Agency officials are unfounded and untrue.

hallway directly in front of my office door for until sometime in July 2008.[19]

On February 29, 2008, the Agency officials at PVAMC attempted to arrest me for false charges of alleged *Battery*, alleged *Assault*, and alleged *Disorderly Conduct*.[20]

On May 29, 2008, during the MSPB Hearing, the Agency's attorney stated that the Agency officials at PVAMC had *rescinded* my performance appraisal rating from December 2005 as an '*administrative error*,' after these same Agency officials at PVAMC used this *untruthful and unsubstantiated* document to remove me from my clinical assignment, to demote

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[19] On Saturday, June 23, 2007, while off duty, three days prior to my *false* arrest on June 26, 2007, I was in my office at the medical center and with the help of a co-worker I was reviewing information for my involuntary non-clinical assignment in the C&P Section. I made at least one trip to my car in the VA garage to bring in additional personal items. I was charged by Margaret O'Shea-Caplan, Associate Director of Finance at PVAMC, and by the Agency's officials for alleged theft of VA property (for taking my personal items back to my car in the VA garage). This charge was purely *pretextual* in nature and it was made in reprisal for my protected disclosure to the VA IG's Office on July 23, 2006 and for my ongoing EEO activity.

[20] On February 29, 2008, I arranged a meeting with Jeffrey Kaufman, Chief of VA Police at PVAMC, to discuss the court ordered inquiry from earlier that morning. An incident was staged that afternoon by the Agency Officials at PVAMC, in order to arrest me based on *false charges* of *alleged* Battery, *alleged* Assault, and *alleged* Disorderly Conduct at the time I met with Mr. Kaufman to obtain the names of the Agency officials who authorized my *False Arrest* on June 26, 2007.

me to a non-clinical assignment in the C&P section, and to decrease my annual salary in January 2007.[21]

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[21] On March 13, 2009, the Merit Systems Protection Board (Board) issued Opinions and Orders for two appeals on the same day. The first Opinion and Order was for MSPB Docket No. PH-1221-08-0019-W-1 (Wadhwa1), filed on October 10, 2007, and the second Opinion and Order was for MSPB Docket No. PH-1221-08-0502-W-1 (Wadhwa2), filed on July 3, 2008. In the March 13, 2009 Opinions and Orders (Wadhwa1) and for (Wadhwa2) the MSPB stated it found:

1. The AJ erred in finding that my July 23, 2006 disclosure was not protected
2. The AJ erred in finding that my disclosure was not a contributing factor in my (permanent) reassignment
3. The AJ erred in applying the doctrine of collateral estoppel to preclude me from litigating whether my July 23, 2006 disclosure was protected.

Most importantly, the March 13, 2009 Opinion and Order (Wadhwa1) stated that the Board found that the AJ erred in finding that my July 23, 2006 protected disclosure was not a contributing factor in my (permanent) reassignment to the Compensation and Pension (C&P) Section at PVAMC, in January 2007.[21] I assert that my ongoing EEO activity was also a contributing factor to my permanent reassignment to the C&P Section in January 2007.

On June 27, 2008, the Agency officials at PVAMC performed an unreasonable *search and seizure* of my personal items, which I was carrying in a clear plastic ACME bag.[22]

On February 11, 2009, I was denied performance pay for FY 2008, based on a false performance appraisal rating by the Agency officials at PVAMC.[23]

On March 12, 2009, I was denied a cash award for successful certification in the performance of C&P examinations by the Agency officials at PVAMC.[24]

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[22] On June 27, 2008, a VA Police Officer at the medical center stopped me in the hallway to inspect the contents of my personal items in a clear plastic Acme bag, as I was leaving the medical center for the day at the end of my tour of duty. The contents of this clear plastic bag were the same contents I had brought into the medical center earlier that same morning. The VA Police Officer *confiscated* my clear plastic Acme bag without cause and asked me to follow him to the VA Police surveillance camera area, where he inspected the contents of this clear plastic Acme bag and then he returned the bag with the contents to me.

[23] In reprisal for my ongoing EEO activity and my July 6, 2008 appeal to the Board (Wadhwa2), on February 11, 2009, Dr. Murphy and Margaret O'Shea-Caplan issued to me a *false* performance appraisal rating for FY 08, and on March 12, 2009, Dr. Murphy informed me that he and Ms. O'Shea-Caplan had decided that I will not receive the cash award for my successful completion of certification in the performance of C&P examinations.

[24] In the "Certification of Clinicians Performing Compensation and Pension Examinations," VHA Directive 2008-005, dated January 29, 2008, it states that $1000 may be granted to physicians for successful certification in the performance of C&P examinations. I passed this C&P certification examination in April 2008.

3. Did the MSPB or arbitrator apply the wrong law? Yes; If so, what law should be applied?

On March 13, 2009, in the MSPB Opinion and Order (Wadhwa1), the Board found that I complained of numerous, specific safety deficiencies at PVAMC, and I drew a reasonable causal relationship between my July 23, 2006 protected disclosure and the Agency's decision to take a personnel action of my *permanent* assignment to the C&P Section in January 2007. I established that, in at least two incidents, another medical professional and I at PVAMC were threatened with serious injury by patients that I reported to the VA IG on July 23, 2006.

On March 13, 2009, in the MSPB Opinion and Order (Wadhwa1), the Board found that the prospect of bodily injury to hospital staff is sufficiently serious to satisfy that prong of the statutory standard. *See Chambers v. Department of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008) (stating that "the nature of the harm – the potential consequences – affects the substantiality of the danger").

On March 13, 2009, in the MSPB Opinion and Order (Wadhwa1), the Board found that by going to the VA IG after making numerous complaints to my supervisors that I believed were ignored, I had made a protected disclosure under the rule that where an employee "goes outside the chain of command because he feels that those officials are 'unresponsive,' his disclosures are protected." See *Johnson v. Department of Health & Human Services*, 93 M.S.P.R. 38, (2002)

Publicly known test used too restrictively by the AJ

The Board found that interpretation of the "publicly known" test was used **too restrictively** by the AJ in her decision for the MSPB Opinion and Order (Wadhwa1) and the MSPB Opinion and Order (Wadhwa2). *See Meuwissen v. Dep't of Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000)
Also, the Board further agreed with me in the MSPB Opinion and Order (Wadhwa1) that I did more than merely restate observable facts to the VA IG, but rather, as a physician practicing at the facility, I provided a perspective not discernable to members of the visiting public by recognizing the potential threat to medical providers' safety that the lack of safety caused. Therefore, the Board held in its decision in MSPB Opinion and Order (Wadhwa1) that my statement to the VA IG was a protected disclosure, notwithstanding that Agency officials at PVAMC had previously detected the same safety issues problem identified by me, but the Agency officials at PVAMC failed to act on it to my satisfaction.

Furthermore, in the March 13, 2009 Opinion and Order (Wadhwa1) the Board states it found:

1. The AJ erred in finding that my disclosures (Dom Wadhwa, M.D., *pro se*, Appellant "Dr. Wadhwa") were not protected.
2. The AJ erred in finding that my disclosures were not a contributing factor in my reassignment (to the C&P Section).

Most importantly, the March 13, 2009 MSPB Opinion and Order (Wadhwa1) states that the **Board found that the AJ erred in finding that**

my disclosures were not a contributing factor in my reassignment.

Please note: In January 2007, in retaliation for my July 23, 2006 protected disclosure, the Agency officials at PVAMC used the FY 05 *false and inaccurate* performance appraisal rating report (that was later rescinded) to demote me to a non-clinical position with a drop in my annual salary and then *rescinded* the FY 05 proficiency report as an "*administrative error.*" The Agency officials at PVAMC never notified me of the reasons why the FY 05 *false and inaccurate* performance appraisal rating report was rescinded.

Therefore, it is my contention that the AJ erred regarding my *permanent* reassignment to the C&P Section.

Reprisal for My July 23, 2006 Whistleblower Activity Demotion and reduction in salary and denial of performance pay based on false and inaccurate FY 05 performance appraisal rating

In reprisal for my July 23, 2006 whistleblower activity, the Agency officials at PVAMC used *false* allegations of an alleged *Privacy Act* violation and a *false performance appraisal rating* to justify my *permanent* reassignment to the C&P Section and they subsequently reduced my annual salary by $2,257 and denied me performance pay.[25] After achieving their objective, these Agency officials at PVAMC issued to me a reprimand (not based on conduct or performance) for the alleged *Privacy Act* violation and offered me no explanation and then they *rescinded* my *false* performance appraisal rating as an *'administrative error.'*

During the May 29, 2008 Hearing for this MSPB Case (Wadhwa1), the Agency's witnesses[26] did not provide any evidence whatsoever, regarding my alleged clinical incompetence in Primary Care. I assert that they did not do so, because they lacked

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[25] MSPB Docket No. PH-0752-07-0313-I-1 and MSPB Docket No. PH-3443-07-0638-I-1 were consolidated into one appeal in the U.S. Court of Appeals for the Federal Circuit, Consolidated Docket Number: 2008-3176, -3177 (Writ for Certiorari Docket No. 08 - 0702 for this appeal to The Supreme Court of the United States).

[26] The main witnesses for the Agency were: Dr. John Murphy, Director of Primary Care and my first level supervisor, Dr. Michael Grippi, former Chief of Medicine Service and my then second level supervisor, and Dr. Martin Heyworth, Chief of Staff and my third level supervisor.

documented evidence to support their allegations. Also, these Agency witnesses failed to provide any documentation or testimonies from my co-workers in Primary Care, regarding my alleged clinical incompetence in Primary Care.

It is significant to inform this Court that I was allowed to work full-time as an attending physician in Primary Care for six years and I had the highest workload, with the sickest patients, of the over forty Primary Care providers at the medical center, prior to receiving this *false* performance appraisal rating. If what the Agency's witnesses said about my alleged clinical incompetence is true, why was I allowed to stay in this position for over six years? Also, if this performance appraisal rating was genuine and true, why did these Agency's witnesses not institute a *performance improvement plan (PIP)*, that is required by the VA regulations, after the issuance of this performance appraisal rating?

Proximate Cause

It should be noted that my July 23, 2006 protected disclosure to the VA Office of the Inspector General (VA IG), regarding the unsafe working conditions in the Primary Care Clinics at PVAMC was the proximate cause of a proposed fourteen day suspension[27] of me on July 26, 2006, within three days of the protected disclosure, followed by a proposed removal from my employment[28] on August 30, 2006, within five weeks of the protected disclosure based on *false* charges of an alleged *Privacy Act violation*, and then my eventual *permanent* reassignment to the C&P Section on January 22, 2007, within five months of my protected

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[27] I have received the proposed fourteen day suspension in an incomplete draft form from Dr. Murphy because this proposed major adverse disciplinary action was initiated immediately after I made the protected disclosure. Due to the Agency's haste to issue this proposed disciplinary action, it was mistakenly prepared by Dr. Murphy and given to me by him (instead of Dr. Grippi), as per the medical center memorandum for major disciplinary actions for Title 38 employees. Eventually, the Agency rescinded this proposed fourteen day suspension and offered no explanation to me.

[28] On August 30, 2006, Dr. Grippi proposed my removal from my over twenty year employment with the Department of Veterans Affairs within five weeks of my protected disclosure on July 23, 2006. Dr. Murphy proposed a fourteen day suspension on July 25, 2006, within three days of my protected disclosure on July 23, 2006. In January 2007, Dr. Murphy, Dr. Grippi, and Dr. Heyworth convened a ten-member panel and a false performance appraisal rating, in order to permanently reassign me to the C&P Section, within five months of my protected disclosure.

disclosure based on a *untruthful and unsubstantiated* performance appraisal rating.

Pretext

During the May 29, 2008 Hearing, the Agency's witnesses unsuccessfully attempted to make a collaborative last-minute effort to accuse me of clinical incompetence in Primary Care (after over twenty years of excellent clinical performance in this field of medicine). This was done by the Agency's witnesses in order to find a legitimate reason for their decision to *permanently* reassign me to the C&P Section and, as such, I believe their reason was purely *pretextual*. This became necessary when Agency's Counsel realized that the alleged 'critical need' in the C&P Section was not a plausible reason for assigning me, a primary care physician with absolutely no knowledge or experience in the performance of these C&P examinations in a role to address a 'critical need.'

Restriction of my testimonies from Agency's witnesses during the Hearing

During the May 29, 2009 MSPB Hearing, the AJ would not allow me to fully question the Agency's witnesses after I had questioned the first witness, Dr. John Murphy, for approximately four to five hours.[29] Further, the AJ would not permit me to ask the same questions of the remaining Agency's witnesses (Dr. Grippi and Dr. Heyworth) to reveal

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[29] Dr. John Murphy was my first witness, whom I questioned for approximately four to five hours. I was allowed to ask him most of my questions.

the inconsistencies in their last-minute *untruthful and substantiated* testimonies.

The AJ would not allow me to cross-examine the witnesses after Stacey Conroy, the Agency's Counsel, had questioned these Agency's witnesses. This would have allowed me to bring into evidence the contradictions in their testimonies as well as elicit the inconsistencies. Ms. Conroy led the Agency's witnesses through a series of yes and no questions. During their testimony, the Agency's witnesses limited their answers to yes and no, or at the most, to very short answers.

The AJ would not allow me to bring in additional witnesses to offer rebuttal testimony against the *untruthful* and *unsubstantiated* statements made by the Agency's witnesses during the May 29, 2008 Hearing. Then, the AJ erroneously concluded in her decision that I did not offer rebuttal to the testimonies of the Agency's witnesses.

When my first witness, Dr. Murphy, was excused from the witness stand, the AJ informed him that he must be available to be recalled as a witness. However, later on during the day the AJ changed her mind and she would not permit me to recall Dr. Murphy to the witness stand to demonstrate the contradictions and the inconsistencies in his testimony in comparison to the testimonies of the other Agency witnesses.

Assumption of 'critical need' in the C&P Section

The AJ assumed the 'critical need' in the C&P Section developed during the three work days of my *involuntary* departure from PVAMC to the VA Medical Center in Indiana (VA Northern Indiana Health Care System – VA NIHCS). The AJ would not allow me to demonstrate, through the testimonies of the Agency's witnesses, that the alleged 'critical need' that had been identified predated my departure from PVAMC by at least one year, and was due to a backlog of C&P examinations, of which I had no knowledge of or experience in performing.

The AJ would not allow me to illustrate through the testimonies of these Agency's witnesses that there were other Primary Care attending physicians at PVAMC, including Dr. Murphy, who were fully qualified to perform these C&P examinations and none of these physicians had been utilized by these Agency's witnesses to address the 'critical need' in the C&P Section.
Furthermore, any or all of the attending physicians in Primary Care could be trained in the performance of these C&P examinations and utilized in the C&P Section on a rotating basis, until the backlog of C&P examinations was relieved. My questioning of these Agency's witnesses on this subject matter would have gone to *pretext* of the Agency's proffered reasons for *permanently* reassigning me to the C&P Section.

Transfer from VA NIHCS to PVAMC based on untruthful and erroneous information

In addition, the AJ would not allow me to discuss my involuntary return from VA NIHCS to PVAMC ordered on December 19, 2006 by William F. Feeley, VA Deputy Undersecretary for Health for Operations and Management.

Mr. Feeley's December 19, 2006 order was based on *untruthful* and *erroneous* information provided to Mr. Feeley by the Agency's witnesses. Mr. Feeley, in making his decision, was *deliberately* misled by the Agency officials at PVAMC. Mr. Feeley was misinformed by the Agency officials at PVAMC that I had voluntarily departed from PVAMC to VA NIHCS to "escape a pending disciplinary action at PVAMC." This is not the truth. There was no disciplinary action pending against me when I involuntarily departed from PVAMC. In fact, on October 12, 2006, two days prior to my involuntary departure from PVAMC to VA NIHCS, Dr. Murphy stated to me, "You better take the job in Indiana (VA NIHCS), because you are off the payroll (at PVAMC) as of Saturday, October 14, 2006."

Therefore, on October 14, 2006, I was forced to involuntarily depart from PVAMC to VA NIHCS. On October 12, 2006, I notified, via e-mail, the VISN 4 Director and the Agency officials in Washington, D.C. of my involuntary departure from PVAMC to VA NIHCS. **(Exhibit T)**

Upon my arrival at VA NIHCS in October 2006, I was placed on 'administrative leave' after three workdays and then in December 2006, I was ordered

by Mr. Feeley to return back to my previous assignment as an attending physician in Primary Care, not in the C&P Section.

On March 13, 2007, the Agency officials convened a *national* Administrative Investigation Board (AIB) to investigate my alleged *misconduct* at the time of my departure from PVAMC to VA NIHCS in October 2006. The Agency officials at PVAMC have refused to provide me with the findings of fact report of this investigation.

Also, the Agency officials at PVAMC convened a *local* AIB in the Spring of 2007 (date unknown), regarding my alleged *misconduct* during the June 9, 2006 patient incident when I was trapped in an examination room by a belligerent, hostile patient, who threatened me with *severe* bodily harm.

The Agency officials at PVAMC have refused to provide me with the findings of fact report of this investigation. I assert that the Agency officials at PVAMC have refused to provide me with the findings of fact reports of the *national* and the *local* AIBs, because the *false* allegations brought against me by the Agency's witnesses who were present at the May 29, 2008 MSPB Hearing were unfounded and untrue.

My FY 05 performance appraisal rating was rescinded as an 'administrative error' without an explanation (*untruthful and unsubstantiated* document)

During the MSPB Hearing on May 29, 2008, the Agency officials at PVAMC, through Stacey Conroy, the Agency's Counsel, informed the AJ and me for the first time that the *untruthful and unsubstantiated* performance appraisal rating regarding my clinical competence had been *rescinded* due to an *'administrative error'*. This document was used as the basis for my *permanent* reassignment to the C&P Section by the Agency's witnesses. I was never provided with written documentation of this decision to rescind the *untruthful and unsubstantiated* performance appraisal. It is my contention that these Agency's witnesses used *untruthful and inaccurate documents* as the basis to convince a ten-member panel of the reason for my *permanent* reassignment to the C&P section. Then because of the MSPB hearing, the Agency rescinded the *untruthful and unsubstantiated* performance appraisal rating as an *'administrative error'* so that they could direct the AJ's attention on the five purported reasons why I was assigned permanently to a non-clinical position in the C& P Section.

Once these Agency's witnesses had been successful in convincing the ten-member panel that convened in January 2007 of the need for my permanent reassignment to the C&P section, these Agency's witnesses *rescinded* the *false* proficiency rating under *pretext* of an *'administrative error.'* I assert that *proficiency* rating was withdrawn not due to an *'administrative error'* but rather, because the

Agency's witnesses had no evidence whatsoever to support this *untruthful and unsubstantiated* proficiency rating regarding my clinical competence in Primary Care. It was simply an excuse that was used by the Agency's witnesses to remove me permanently from my clinical position in primary care.

Reprimand issued to me not based on my conduct or performance and without an explanation

On April 3, 2007, the Agency officials issued to me a *reprimand* **based not on my conduct or my performance** for the alleged *Privacy Act violation* and the Agency officials at PVAMC refused to offer me an explanation for the disciplinary action. It is my contention that the Agency officials had no evidence whatsoever to support the alleged *Privacy Act* violation, and thus offered me no explanation for the issuance of the reprimand. I believe it was purely *pretextual*.

Judgment based on demeanor of the Agency's witnesses and not based on evidence

I assert that Dr. Murphy, Dr. Grippi, Kathleen Craige, RN, Nurse Manager, and Margaret O'Shea-Caplan, Associate Director of Finance at PVAMC, in a collaborative effort, were engaged in prohibited personnel practices and they were successful in *falsifying* my performance appraisal ratings in Primary Care, because I was rated *locally* at PVAMC by these individuals, which led to my *permanent* reassignment in the C&P Section.

To date, Dr. Murphy and Ms. O'Shea-Caplan have attempted to *falsify* information in my performance appraisal ratings for my performance of C&P examinations. However, they have been unsuccessful in doing so, because my performance on C&P examinations is now based on *external* performance ratings of these examinations by external reviewers. Thus, it is not possible for Dr. Murphy and Ms. O'Shea-Caplan to manipulate my scores on these C&P examinations.

4. Did the MSPB or arbitrator fail to consider important grounds for relief? Yes; If so, what grounds?

Relief requested from this Honorable Court:

Admission of wrongdoing Agency officials at the Philadelphia VA Medical Center (PVAMC);

Formation of a Five-Member Physician Committee at PVAMC, with me as the Chairman of this Committee, in order to provide ongoing recommendations to the Agency to prevent a similar occurrence as that which occurred to me, from happening at PVAMC in the future;

Issuance by the Court of a mandatory injunction prohibiting the Agency officials at PVAMC from the relentless harassment of me in the workplace for exercising my civil rights;

Dismissal of Kathleen Craige, R.N., Primary Care Nurse Manager, from the Department of Veterans Affairs for aiding Dr. Murphy and Dr. Grippi in

engaging in prohibited personnel practices against me;

Dismissal of Dr. Murphy from the Department of Veterans Affairs for his lack of integrity, violation of VA standards of ethical conduct, conduct policies, performance expectations and prohibited personnel practices;

Reporting of Dr. Murphy and Dr. Grippi to the Medical Licensing Board and the Physicians' National Data Bank for their lack of integrity, violation of VA standards of ethical conduct, conduct policies, performance expectations and prohibited personnel practices;

Dismissal of Margaret O'Shea-Caplan, Associate Director of Finance, for aiding Dr. Murphy and Dr. Grippi in the use of retaliatory, discriminatory prohibited personnel practices against me.

All elements of damages allowable by law and any other applicable entitlements, including punitive damages (in an amount to be determined by the Court to deter the Agency officials at PVAMC from similar misconduct in the future), compensatory damages, consequential damages, and reasonable attorney fees.

5. Are there other reasons why the MSPB's or arbitrator's decision was wrong? Yes; If so, what reasons?

In the March 13, 2009, Opinion and Order (Wadhwa1), the Board stated that by applying the "knowledge/timing test" my *permanent* reassignment

to the C&P Section at PVAMC was within the period of time such that a reasonable person would conclude that my protected disclosure was a contributing factor in this reassignment. The Board stated that six months is well within the range of time between a protected disclosure and a personnel action from which an **inference of causation** arises. *Gonzalez v. Department of Transportation,* 109 M.S.P.R. 250 (2008) (finding that a time period of slightly more than one year satisfied the timing test, and citing cases that also so held) The Board further stated that because I satisfied the knowledge/timing test, the AJ should not have considered any further evidence on the issue. *Gonzalez,* 109 M.S.P.R. 250 (2008)

As mentioned earlier, the existence and strength of any motive to retaliate on the part of the Agency officials who were involved in the personnel action decision of my *permanent* reassignment to the C&P Section is relevant in determining whether the Agency can show by clear and convincing evidence that it would have taken the same action in the absence of whistleblowing. *Grubb,* 96 M.S.P.R. 361.

Here, the AJ restricted my attempt to show the strength of the motive to retaliate by the Agency officials who played a role in my *permanent* reassignment.

It should be noted that none of the testimonies by the Agency's witnesses were supported by facts. These witnesses were asked leading questions by Stacey Conroy and the majority of their testimonies consisted of *yes* and *no* answers to these leading questions. The Agency's witnesses appeared to have

been rehearsed and they did not appear to be relaxed when testifying. They were careful not to elaborate on the few, very brief answers that they did give. They gave consistent answers, because it appeared that they had been coached by Stacey Conroy, the Agency's Counsel.

In addition, the Agency's witnesses provided no documentation whatsoever to support their statements. Therefore, the Agency has not shown by clear and convincing evidence that absent my protected disclosure, I would have been reassigned to the C&P Section. In her Initial Decision, the AJ stated she relied upon the demeanor the Agency's witnesses in making credibility determinations.

I have shown by preponderant evidence, as described above, that my whistleblowing activity was the proximate cause for the Agency's decision to take the personnel action of my *permanent* reassignment to the C&P Section at PVAMC (*Mangano v. Department of Veterans Affairs,* 109 M.S.P.R. 658 (2008) and *Mangano v. Department of Veterans Affairs,* 104 M.S.P.R. 363 (2006)) and that I was not permitted by the AJ to rebut the testimonies given by the Agency's witnesses regarding (1) the backlog of cases in the C&P Section at PVAMC; (2) I am still under the **direct** supervision of Dr. John Murphy, Director of Primary Care, despite my request from the Agency officials at PVAMC not to be; (3) there have been no genuine patient complaints regarding the medical care I have given to the patients in Primary Care; and (4) there have not been any genuine communication problems whatsoever between the nurses and the other staff and me in my original over twenty-year assignment as an attending physician in

Primary Care within the Department of Veterans Affairs.

Therefore, I assert that the AJ erred when she concluded that the Agency had provided clear and convincing evidence that my *permanent* reassignment to the C&P Section at PVAMC would have occurred, even absent any protected disclosure.

The Agency did not show by clear and convincing evidence that it would have permanently reassigned me to the C&P Section, absent my whistleblowing, because of the five reasons proffered by the Agency and discussed earlier.

I also assert that the AJ incorrectly applied the clear and convincing evidence test for whistleblower retaliation and failed to address all of my concerns including: the *untruthful and unsubstantiated* performance appraisal rating, *false* charge of alleged *Privacy Act* violation, the events leading to my involuntary transfer from PVAMC to VA NIHCS, my involuntary return from VA NIHCS to PVAMC, the Agency's charges of alleged *misconduct* by me regarding the patient incident that could have resulted in *severe* bodily harm to me, my alleged *misconduct* during transfer from PVAMC to VA NIHCS, safety issues in the Primary Care Clinics, inappropriate narcotic prescriptions by Primary Care nurse practitioners, the national and local AIBs that convened regarding my alleged *misconduct*, and the issuance of a reprimand that was *not based on my conduct for my performance*.

The AJ had similarly erred in restricting my attempts to show the strength of the Agency officials' motive to retaliate against me by failing to address all of mt concerns.

In *Porter v. Department of Defense,* MSPB Docket No. DC-315H-03-0146-I-2 (Initial Decision, Sept. 5, 2003) the AJ reversed the Agency's constructive removal action of the appellant. Here, my transfer from VA NIHCS to PVAMC was involuntary and the Agency did not provide me with information about my Board appeal rights that would have enabled me to make an informed decision as to whether to transfer back or not.

During the entire time I had no break in service, referred to as 'current continuous employment;' and defined by the Office of Personnel Management (OPM) regulations, as 'a period of employment or service immediately preceding a *proposed* removal action in the same or similar positions without a break in Federal civilian employment of a workday.' 5.C.F.R.§ 752.402(b).

On my arrival at VA NIHCS, I worked three workdays and then I was returned back to my previous employment at PVAMC (without a break in service) See *Butterbaugh v. Department of Justice,* 336 F.3d 1332, 1338 (Fed. Cir. 2003) (distinguishing workdays from calendar days). Thus, this case law states that the Board must follow *McCormick* because it is bound by the precedential decision of the Federal Circuit, the Board's reviewing court. See *McCormick v. Department of the Air Force,* 329 F.3d 1354 (Fed. Cir. 2003) and *Fairall v. Veterans*

Administration, 33 M.S.P.R. 33, 39, *aff'd*, 844 F.2d 775 (Fed.Cir. 1987)

Also, it should be noted that upon my involuntary transfer to PVAMC from VA NIHCS in January 2007, I satisfied the following: (1) my prior work service was rendered immediately preceding my transfer back to PVAMC; (2) it was performed in the same Agency; (3) it was performed in the same line of work; and (4) there was no break in service. 5 C.F.R. § 315.802 (b).

Therefore, by noting the totality of the evidence, is demonstrated my actions were sufficient to put the Agency on notice that my transfer from PVAMC to VA NIHCS and from VA NIHC to PVAMC was involuntary. For instance, I had sent a memorandum to the VISN Director and the Agency officials at the VA Central Office in Washington D.C., on October 12, 2006, (Exhibit R) prior to my involuntary transfer from PVAMC to VA NIHCS. In this memorandum I complained about the Agency's wrongful actions against me. Also, Dr. Murphy, my immediate supervisor, forced me to transfer from PVAMC to VA NIHCS or he would terminate my employment at PVAMC in 2 days.

The Agency's December 19, 2006 Directed Reassignment order involuntarily transferred me back from VA NIHCS to PVAMC. In this letter, I was informed by the Agency's officials to either transfer back to PVAMC or be subjected to involuntary separation from my VA employment. The Agency has a duty to provide notice of appeal rights to an employee like myself, who had been offered no alternatives to the involuntary transfer or

involuntary separation from my VA employment. Please note that my actions were sufficient to put the Agency's officials on notice because I considered these actions as involuntary. See *Malone v. Department of the Air Force*, 41 M.S.P.R. 594, 596-97 (1989). Thus, when I was deciding whether to transfer involuntarily or face imminent separation, I was making that decision with the Agency's lack of information regarding my appeal rights.

In the situation of an employee facing an involuntary transfer or facing imminent involuntary separation, if the Agency's officials withhold information or make misleading statements upon which an employee, reasonably relied to his/her detriment, then the transfer or separation is involuntary. See *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed.Cir. 1983). Also, "A decision made 'with the binders on,' based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process." *Covington v. Department of Health & Human Services*, 750 F.2d 937, 943 (Fed. Cir. 1984); see also *Gutierrez v. U.S. Postal Service*, 95 M.S.P.R. 171, 183 (2003). Therefore, I agreed to transfer involuntarily from PVAMC to VA NIHCS and involuntarily transfer back from VANIHCS to PVAMC within three workdays without being told by the Agency officials that I had appeal rights.

Nevertheless, I am not required to show that the Agency actually intended to deceive me into involuntary transfer or face involuntary separation from my VA employment. As the Federal Circuit has explained:

> As an employee I am not required to show intent to deceive on the part of the Agency in order for involuntary transfer or face involuntary separation from my VA employment. Rather, it is sufficient for me to show that a reasonable person would have been misled by the Agency's statements....Applying this test, the court will neither inquire into my subjective perceptions as an employee, nor the subjective intentions of the Agency.

Scharf, 710 F.2d at 1575. It is clear that the Agency misled me by informing me that I had no appeal rights and that I justifiably relied on this misleading advice to my detriment.

Furthermore, the Agency's discussions of involuntary retirement plans attached to the December 19, 2006 Directed Reassignment letter was an attempt by the Agency to force me into a constructive discharge/involuntary retirement in reprisal for my July 23, 2006 whistleblower activity and my prior EEO activity.

A retirement is presumed to be a voluntary act and, therefore, beyond the Board's jurisdiction. However, the only situation in which the Board has jurisdiction over the propriety of an employee's retirement, is if the retirement, because involuntary, amounts a constructive removal, as was the case in my situation in December 2006. Thus, I must be afforded an adequate opportunity to establish jurisdiction, under the proper standard, over my alleged constructive discharge/involuntary retirement. See *Handy v. Department of the Army*, 82 M.S.P.R. 683 (1999);

Rule v. Department of Veterans Affairs, 81 M.S.P.R. 282 (1999)

It is clear that, under the totality of the circumstances discussed above, the Board will normally conclude that my transfer was involuntary, and not only does the Board have jurisdiction but I would also win on the merits and be entitled to reinstatement to my previous clinical position in Primary Care at PVAMC. *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1986) (the Board's jurisdiction and the merits of an alleged involuntary separation are inextricably intertwined). Thus, the Board normally reverses the Agency's action in such a situation.

In addition, the AJ denied me a full and fair hearing by erroneously limiting cross-examination and denying additional witnesses and discovery. The AJ erred in restricting my attempts to show the motive of the Agency's witnesses to retaliate against me. The AJ denied my the opportunity to develop evidence related to the Agency's witnesses stated reasons for my *permanent* reassignment to the C&P Section, and then erroneously relied on the lack of evidence to rule against me.

When determining whether the Agency's witnesses have shown by clear and convincing evidence that they would have taken the same personnel action in the absence of whistleblowing, the AJ must consider the strength of the evidence of the Agency's witnesses evidence in support of its personnel action, the existence and strength of any motive to retaliate on the part of the Agency's witnesses who were involved in the decision, and any evidence that the

Agency's witnesses take similar actions against employees who are not whistleblowers but who are otherwise similarly situated. The AJ erroneously found that the Agency's witnesses met this burden of proof.

I have established evidence to show that the Agency's *misconduct* charge against me of an alleged *Privacy Act* violation was made to support the proposed fourteen day suspension, my proposed removal and the Agency convened a ten-member panel for my *permanent* reassignment to the C&P Section, as *pretext* for gathering evidence to use to retaliate against me for whistleblowing. The evidence clearly shows that the ten-member panel was convened by the Agency's witnesses in order to open up a forum for discussing professional competence issues used to reassign me to the C&P Section. The national and local AIBs that were further used to investigate me for alleged *misconduct* were *pretextual* and in reprisal for my whistleblower activity.

Thus, when examining retaliatory motive for an Agency action, officials 'involved' in the action may encompass more than just the proposing or deciding officials and may include other officials upon whom the proposing or deciding official would rely upon for information, as was done in my situation. The various input that the deciding officials received from other officials played an important role in the Agency decision to permanently reassign me to the C&P Section. Also, the analysis by the AJ in her initial decision for this case was erroneously restrictive in determining the officials 'involved' in my *permanent* reassignment to the C&P Section.

It is very important to note that during the May 29, 2008 MSPB Hearing, the AJ repeatedly interrupted the Hearing during the day and met with me alone (off the record) to discuss settlement of this case. Even before I had completed my questioning of all the Agency's witnesses, the AJ stated to me that I was not going to win this case. The AJ stated that I would be better off with settlement of this case. At approximately 5:00 p.m., the *AJ abruptly ended the Hearing* and she again offered me an opportunity for settlement for this case, and *the AJ reminded me again that she had made up her mind that I would not win this case.*

Therefore, I hereby request that the Board grant my petition, vacate the initial decision, and remand my appeal for further adjudication.

6. What action do you want the court to take in this case?

Remedies requested from this Honorable Court:

Grant the Petition for Review for my appeal
Vacate the initial decision by Judge Milligan, dated June 26, 2008
Remand the case for an unrestricted hearing by the U.S. Merit Systems Protection Board, to discuss all personnel actions taken against me by the Agency's officials at PVAMC
Admission of wrongdoing by the Agency's officials at PVAMC
Issue an order to stop the Agency's officials at PVAMC from further harassment of me in the

workplace because of my July 23, 2006 protected disclosure and my ongoing EEO activity
Issue an order for my return to my over twenty-two year tenured clinical position in Primary Care at PVAMC.

7. Do you want to argue before the court in person? Yes; If yes, what are the reasons why argument will aid the court? (Refer to paragraph 15 of the Guide.)

I would like to present oral argument on the information attached in the appendix I and appendix II, which is as follows:

Initial Brief, dated October 27, 2007 **(Exhibit A)**
Order issued on December 7, 2007, regarding the December 12, 2007 status conference **(Exhibit B)**
Issues discussed in the status conference on December 12, 2007 **(Exhibit C)**
My response to the Burgess Notice, dated December 17, 2007 **(Exhibit D)**
Issues discussed in the second status conference on January 17, 2008 **(Exhibit E)**
Issues discussed in the third status conference on January 25, 2008 **(Exhibit F)**
Order issued by the AJ on April 18, 2008, that rejected my Motion to Compel Discovery **(Exhibit G)**
Pro Se status approval Order **(Exhibit H)**
My request for additional witnesses to the AJ for the MSPB hearing on May 30, 2008 **(Exhibit I)**
My request to the AJ to recall the Agency's witnesses on June 1, 2008 **(Exhibit J)**
My second request to the AJ to reopen the record for in-depth testimony on the issues the AJ restricted

me from discussing during the MSPB hearing on May 29, 2009 **(Exhibit K)**
Ruling by the AJ to recall witnesses is denied, dated June 26, 2008 **(Exhibit L)**
The AJ used information from an unknown source that was untruthful and unsubstantiated in her Initial Decision of June 26, 2008 **(Exhibit M)**
My Petition For Review to the Board, filed on July 28, 2008 **(Exhibit N)**
Acknowledgment by the Board of my Petition For Review on July 29, 2008 **(Exhibit O)**
Untruthful and unsubstantiated information in the MPSB Opinion and Order (Wadhwa1), dated March 13, 2009 **(Exhibit P)**
My Request for Reconsideration, dated March 23, 2009 of the Opinion and Order (Wadhwa1), dated March 13, 2009 **(Exhibit Q)**
Denial of Request for Reconsideration by the Board, dated March 31, 2009 **(Exhibit R)**

During oral argument I would like to discuss my transfers to VA NIHCS from PVAMC and from VA NIHCS to PVAMC that were involuntary.

Also, I would like to discuss the December 19, 2006 Directed Reassignment order from VA NIHCS to PVAMC that was the Agency's constructive removal action against me.

8. Do you intend to represent yourself? Yes; If you have not filed an Entry of Appearance, indicate your full name, address, and telephone number.

Dom Wadhwa, M.D., 215 E Camden Ave, H-13,
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9. I certify that a copy of this brief and the appendix was sent to the attorneys for respondent, at the following address:

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(Address is found on the Entry of Appearance served on you by the attorney for the respondent. If you do not send a copy of this brief to the respondent, the court will not file the brief.)

_____

Dom Wadhwa, M.D., *pro se*
Petitioner

Date: May 12, 2009

In addition to mailing a copy to the attorney for the respondent, mail an original and three copies of this informal brief and appendix to:

Clerk of Court
United States Court of Appeals for
the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

Appendix Three

United States Court of Appeals for the Federal Circuit

Request for Oral Argument
By the Petitioner
(Wadhwa1)

Docket No. 09-3167

September10, 2009

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, NW
WASHINGTON, DC 20439

Docket No. 09-3167

Dom Wadhwa, M.D., *pro se,* (Wadhwa1)
Petitioner

Department of Veterans Affairs,
Respondent.

Request for Oral Argument by Petitioner, Dom Wadhwa, M.D., *pro se*

Pursuant to the United States Court of Appeals for the Federal Circuit Rules of Practice, I, Dom Wadhwa, M.D., *pro se,* request that the Court hold oral argument on the issues that are the subject of the petitions for review, Case No. 09-3167, of the March 13, 2009, Merit Systems Protection Board's (MSPB) Final Decision in this proceeding for Docket No. PH-1221-08-0019-W-1.

This Honorable Court should hold oral argument because the petitions for review raise issues that are critical for me, as a *pro se* petitioner, to the successful outcome of my appeal.

Furthermore, Matthew H. Solomson, Esquire, Trial Attorney and Respondent for the defendant in his petition entitled, "Respondent's Informal Brief and Appendix," raises "new issues" and makes "new claims" about my case which must be addressed by

me to this Honorable Court, before it can decide on the briefs without prejudice to full consideration of these issues.

By Order in May 2009, the United States Court of Appeals for the Federal Circuit granted the petitions for review of MSPB's March 13, 2009 Final Decision, including in my petition for review of the finding that during the May 29, 2008 MSPB Hearing, Honorable Elizabeth D. Milligan, Administrative Judge (AJ), repeatedly interrupted the Hearing during the day and met with me alone (off the record) to discuss settlement of this case. Even before I had completed my questioning of all of the Agency's witnesses, the AJ stated to me that I was not going to win this case. The AJ stated that I would be better off with settlement of this case. At approximately 5:00 p.m., the *AJ abruptly ended the Hearing* and she again offered me an opportunity for settlement of this case, and *the AJ reminded me again that she had made up her mind that I would not win this case, no matter what evidence I presented.*

Federal Rules of Appellate Procedures state that the United States Court of Appeals will hold oral argument unless exceptional circumstances make oral argument impractical or inadvisable. No such circumstances exist here.

In fact, the opposite is true; oral argument is appropriate here because of the importance of the issues raised by the petitions for review. Obviously, the petitions for review are of critical importance to me as they may affect the outcome of my appeal to

this Court.

The issues raised by the petitions are also critical to this Honorable Court's consideration of the genuine facts.

If the MSPB's March 13, 2009 Final Decision is upheld based solely on the content of the briefs, the Court will be unable to reach conclusions based on facts.

The Respondent for the defendant, Matthew H. Solomson, Esquire, Trial Attorney, goes beyond the scope of the defendant counsel's motion and raises "new issues" and "new claims," in his document entitled, "Respondent's Informal Brief and Appendix," including:

The *ex-parte* communication by Staccy Conroy, Esquire, consisted of bold-faced lies to Honorable Elizabeth D. Milligan, the Administrative Judge on my appeal for this case, Docket Number: PH-1221-08-0019-W-1, filed on October 10, 2007. The basis for my assertion is that there are grossly inaccurate statements in this document that could only have been provided to the AJ by Ms. Conroy.

I. For example, the June 26, 2008 Initial Decision for PH-1221-08-0019-W-1, states:

Moreover, the undisputed facts show that the supervisors had initiated the AIB investigation into the appellant's alleged violation of the Privacy Act on June 29, 2006[June 22, 2006], almost one month before the appellant's alleged protected disclosure on July 23, 2006. [30]

This statement is a bold-faced lie that was provided *ex parte* by Ms. Conroy to the Board. The facts are, as follows. On June 22, 2006, the Agency officials at PVAMC initiated the AIB investigation on a June 9, 2006 patient incident, falsely accusing me of *patient abuse*. There was no AIB investigation initiated regarding the alleged violation of the *Privacy Act* on June 22, 2006. **(Exhibit A)**

This inaccurate information is perpetuated as a "fact" in Mr. Solomson's "Respondent's Informal Brief and Appendix" **for my current appeal to this Honorable Court, Case No. 09-3167, which states:**

"With regard to the incident on June 9, 2006, Dr. Wadhwa also filed a report with the VA's Office of Resolution management, in which he included the patient's private information (e.g., the patient's name, address, phone and social security numbers). On June 29, 2006, as a result of Dr. Wadhwa's release of

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[30] The Administrative Investigation Board (AIB) was initiated by Michael Sullivan, former medical center director, regarding the June 9, 2006 patient incident on June 22, 2006, not June 29, 2006, as inaccurately stated in the June 26, 2008 Initial Decision for PH-1221-08-0019-W-1.

the patient's private information, PVAMC management officials requested that Michael Sullivan, Director of PVAMC, initiate an investigation by a local Administrative Investigation Board (AIB) into possible Privacy Act violation...On July 26, 2006, Dr. Wadhwa was issued a proposed 14-day suspension letter for the alleged violation of the Privacy Act."

This is a bold-faced lie provided by Ms. Conroy to the AJ through *ex parte* communication. This bold-faced lie is being perpetuated as "a fact" by Mr. Solomson in his "Respondent's Informal Brief and Appendix." The genuine facts are, as follows:

In a letter addressed to my attorney, Dennis L. Friedman, dated April 18, 2006, Robyn Labombarda, Regional EEO Officer, at the Office of Resolution Management (ORM), drew an *erroneous* conclusion regarding my March 30, 2006 precomplaint counseling request. **(Exhibit B)**

On April 23, 2006, Mr. Friedman responded to Ms. Labombarda's April 18, 2006 letter. Mr. Friedman requested that Ms. Labombarda apprise him of whose privacy rights I had violated, and specifically, how I had violated the privacy rights of the individual she identified in her April 18, 2006 letter. **(Exhibit C)**

On May 17, 2006, Ms. Labombarda responded to Mr. Friedman's letter, in which she claimed that I had sent patient records to Mr. Friedman, which was not the case. **(Exhibit D)**

On July 26, 2006, three days after my protected disclosure of the safety issues at PVAMC to the VA IG's Office, Dr. Murphy issued a Proposed Fourteen (14) Day Suspension to me for my alleged *Privacy Act* violation on March 30, 2006. **(Exhibit E)** This major disciplinary action was *pretextual* for my July 23, 2006 protected disclosure.

A local AIB initiated by Mr. Sullivan on June 22, 2006 was not regarding the alleged March 30, 2006 *Privacy Act* violation but, rather, was about the June 9, 2006 patient encounter incident.

Furthermore, it is important to note that on another similar occasion, Ms. Conroy made an *ex-parte* communication to the Administrative Judge (AJ) on my appeal to the Equal Employment Opportunity Commission (EEOC), regarding my discrimination complaints that have been **remanded for reinvestigation** by EEOC. **(Exhibit F)**[31]

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[31] On a similar occasion, on August 26, 2009, the United States Court of Appeals for the Third Circuit, Docket No. 09-1835, vacated and remanded my civil action No. 06-4362 to the United States District Court for the District of New Jersey for further proceedings.

This example makes it clear that Mr. Solomson as defendant's counsel in his "Respondent's Informal Brief and Appendix," repeatedly makes completely false statements, as if reciting a litany of genuine facts about the case. He makes these statements to the Board based on bold-faced lies made by Ms. Conroy. Then, Mr. Solomson as defendant's counsel states findings and reaches conclusions, not based on the genuine facts, but rather on newly invented issues and newly invented claims.

Matthew H. Solomson, Esquire, Trial Attorney and Respondent for the defendant in his "Respondent's Informal Brief and Appendix" also does not address numerous points made by me in my "Informal Brief of the Petitioner," dated May 12, 2009. Furthermore, Mr. Solomson, defendant's counsel, has made statements based on bold-faced lies by Ms. Conroy to the Board. Also, Mr. Solomson has not produced a single shred of evidence to support any of the "new issues" and "new claims" made by him as defendant's counsel.

The strategy of Mr. Solmonson, as defendant's counsel, has been to systematically ignore all my well-founded claims and create new issues and new claims, in order to distract and mislead this Honorable Court.

I, petitioner, respectfully request the opportunity to address these and other arguments made by or omitted by defendant's counsel in the "Respondent's Informal Brief and Appendix."

Petitioner believes that oral argument is necessary and appropriate to fairly resolve defendant

counsel's motion, and will benefit and assist the Court in its resolution of:

(a) the actual facts in this case,

(b) whether defendant counsel's new issues and new claims are untenable and untrue as described, and if so,

(c) whether I, as the Petitioner, am entitled to have these false and misleading statements stricken from the record.

For the foregoing reasons, the Court should grant this request and provide for oral argument on the issues raised by the petitions for review in this proceeding.

Respectfully submitted,

Dom Wadhwa, M.D., *pro se*

Dated: September 10, 2009

Petitioner's Home Address
Dom Wadhwa, M.D., *pro se*,
215 East Camden Avenue, H-13
Moorestown, New Jersey 08057
Cell: 609-220-2771

In addition to mailing a copy to the attorney for the respondent, I am mailing an original and three copies of this brief and appendix to:

Clerk of Court
United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

Exhibit A

The AIB Memorandum, dated June 22, 2006 and the EEO pre-complaint counseling request, dated June 18, 2006*

The AIB was initiated by Michael Sullivan, Former Medical Center Director, regarding my patient encounter on June 9, 2009 with a belligerent, hostile patient who threatened to inflict bodily harm on me.

**This AIB (Administrative Investigation Board) was not regarding an alleged Privacy Act violation, as stated in the Initial Decision, Docket Number: PH-1221-08-0502-W-1, dated June 28, 2008. This inaccurate information was provided to the Board via ex-parte communication by Stacey Conroy, Esquire, to the Administrative Judge, Honorable Elizabeth D. Milligan.*

Exhibit B

April 18, 2006, letter from Robyn Labombarda, Regional EEO Officer, at the Office of Resolution Management (ORM), to my attorney, Dennis L. Friedman**

***Ms. Labombarda drew an erroneous conclusion regarding my March 30, 2006 precomplaint counseling request. She assumed I had released my personal handwritten notes on a patient to my attorney, which I did not. Also, my personal handwritten notes on this patient were not part of a system of records.*

Exhibit C

April 23, 2006, letter from Dennis L. Friedman to Robyn Labombarda, Regional EEO Officer, at the Office of Resolution Management (ORM)***

***Mr. Friedman requested Ms. Labombarda to apprise him of whose privacy rights I had violated, and specifically, how I had violated the privacy rights of the individual she identified in her April 18, 2006 letter.*

Exhibit D

May 17, 2006, letter from Robyn Labombarda, Regional EEO Officer, at the Office of Resolution Management (ORM) to Dennis L. Friedman****

****On May 17, 2006, Ms. Labombarda responded to Mr. Friedman's letter, in which she claimed I had sent patient records to Mr. Friedman, which was <u>not</u> the case.*

Exhibit E

On July 26, 2006, three days after my protected disclosure of the safety issues at PVAMC to the VA IG's Office, Dr. Murphy issued a Proposed Fourteen (14) Day Suspension***** to me for my alleged *Privacy Act* violation on March 30, 2006.

*****This major disciplinary action was <u>pretextual</u> for my July 23, 2006 protected disclosure.*

Exhibit F

Stacey Conroy, Esquire, made an *ex-parte* communication with the Administrative Judge (AJ) for my appeal to the Equal Employment Opportunity Commission (EEOC), regarding my discrimination complaints that have been **remanded for reinvestigation** by EEOC.******

******On a similar occasion, on August 26, 2009, the United States Court of Appeals for the Third Circuit, Docket No. 09-1835, vacated and remanded my civil action No. 06-4362 to the United States District Court for the District of New Jersey for further proceedings.*

Appendix Volume II

for Docket No. 2009-3169

(Appendix Four, Appendix Five, and Appendix Six)

Appendix Four

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 34

Docket No. PH-1221-08-0502-W-1
Dated March 13, 2009
(Wadhwa2)

Final Opinion & Order

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 34

Docket No. PH-1221-08-0502-W-1

Dom Wadhwa,

Appellant,

v.

Department of Veterans Affairs,

Agency.

March 13, 2009

Dom Wadhwa, Moorestown, New Jersey, pro se

Stacey Conroy, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Neil McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the August 4, 2008 initial decision (ID) that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the PFR and AFFIRM the ID as MODIFIED, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 On July 6, 2008, the appellant, a Physician with the Philadelphia Veterans Administration Medical Center (PVAMC), filed an IRA appeal. Initial Appeal File (IAF), Tab 1. He accused the agency of taking the following actions:

1. On June 26, 2007, in retaliation for his July 23, 2006 whistleblower disclosure to the Veterans Administration Inspector General (VA IG) of unsafe working conditions and for his previous equal employment opportunity (EEO) activity, the agency read him his *Miranda* rights and advised him that he was under investigation for alleged theft; 2. on February 29, 2008, in retaliation for his filing a July 3, 2007 civil lawsuit about the June 26, 2007 incident, the agency staged an incident in an attempt to arrest him for battery, assault, and disorderly conduct; and 3. on June 27, 2008, in retaliation for his July 23, 2006 disclosure, his previous EEO activity, and his lawsuit, the agency subjected him to an "unreasonable search and seizure of his personal information in a clear plastic Acme bag". *Id.* at 6. The administrative judge (AJ) issued a show-cause order to which the appellant responded. IAF, Tabs 5-7.

¶3 The AJ dismissed the appellant's IRA appeal on the basis that he failed to raise a non-frivolous allegation of jurisdiction. ID at 1, 7. With regard to action 1, the AJ found that the doctrine of collateral estoppel precluded the appellant from relitigating whether his July 23, 2006 disclosure to the VA IG was protected, noting that she had found the disclosure not protected in *Wadhwa v. Department of*

Veterans Affairs, MSPB Docket No. PH-1221-08-0019-W-1 (Initial Decision, June 26, 2008). *Id.* at 6. With regard to actions 2 and 3, the AJ found that the appellant failed to show that he had exhausted his remedy before the Office of Special Counsel (OSC). The AJ acknowledged the appellant's contention that he filed an OSC complaint on July 3, 2008, but found that, even assuming that it involved those incidents, his July 6, 2008 Board appeal was premature. *Id.* at 5. The AJ also found that the appellant failed to show that his IRA appeal was timely filed with regard to all of the personnel actions listed in his previous June 27 and July 24, 2007 OSC complaints. She found that, according to the appellant, OSC terminated its investigations into those complaints and provided him with Board appeal rights in October 12, 2006, and September 27, 2007 letters. *Id.* at 5-6. The AJ further found that the Whistleblower Protection Act (WPA) does not extend to reprisal for filing EEO complaints or lawsuits. *Id.* at 7.

¶4 The appellant has filed a PFR of the ID. PFR File, Tab 1. The agency has not responded to the PFR.

ANALYSIS

The AJ erred in applying the doctrine of collateral estoppel to preclude the appellant from litigating whether his July 23, 2006 disclosure was protected.

¶5 On PFR, the appellant asserts that the use of collateral estoppel was improper in this case. PFR File, Tab 1 at 8-9. Collateral estoppel, or issue preclusion, is appropriate when the following factors are present: (1) The issue is identical to that involved in the prior action; (2) the issue was actually

litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action. *Boechler v. Department of the Interior*, 109 M.S.P.R. 619, ¶ 17 (2008). Collateral estoppel may be applied only when there is a final judgment in the previous litigation. *E.g.*, *Zgonc v. Department of Defense*, 103 M.S.P.R. 666, ¶ 6 (2006), *aff'd*, 230 F. App'x 967 (Fed. Cir. 2007); *Wade v. Department of the Air Force*, 70 M.S.P.R. 396, 398-99, *aff'd*, 104 F.3d 375 (Fed. Cir. 1996) (Table).

¶6 In *Wadhwa*, MSPB Docket No. PH-1221-08-0019-W-1, slip op. at 5, 7-11, the AJ found that the appellant failed to prove by preponderant evidence that his July 23, 2006 disclosure to the VA IG was protected under the WPA. The AJ erred in finding that the doctrine of collateral estoppel precluded the appellant from relitigating whether this disclosure was protected and in using it as a basis for dismissing the instant appeal for lack of jurisdiction. In *Boechler*, 109 M.S.P.R. 619, the Board recently found, under nearly identical circumstances, that the AJ misapplied collateral estoppel. Specifically, the Board determined that the doctrine did not apply to a jurisdictional dismissal because the legal issues involved in the appellant's prior action and his subsequent action were not identical. The issue in the prior action was whether, after a hearing, the appellant proved by preponderant evidence that the disclosure was protected. In contrast, the issue in the

subsequent appeal was whether, on the written record, the appellant had made a non-frivolous allegation that the disclosure was protected. Therefore, the Board found that the application of collateral estoppel failed at the first prong of the test. *Id.*, ¶ 17. In addition, there was no final judgment in *Wadhwa*, MSPB Docket No. PH-1221-08-0019-W-1, when the AJ applied collateral estoppel in this case because the appellant filed a PFR of the AJ's ID in that case on July 28, 2008.

The AJ erred in finding that the appellant's July 23, 2006 disclosure was not protected.

¶7 In his July 23, 2006 letter to the VA IG, the appellant alleged various safety violations at PVAMC. *See Wadhwa v. Department of Veterans Affairs*, 2009 MSPB 33, ¶ 3 (*Wadhwa* I). In *Wadhwa* I, we found that the appellant's July 23, 2006 disclosure was protected whistleblowing. *Id.* Admittedly, the appellant did not submit the actual July 23, 2006 letter in the present case. We note, however, that the appellant submitted the VA IG's August 22, 2006 Report of Contact, which described his disclosure. IAF, Tab 7, Att. 1. Further, the AJ's show-cause order in this matter incorrectly indicated that collateral estoppel might prevent the appellant from showing that the disclosure was protected, which might have discouraged the appellant from submitting the letter. *Id.*, Tab 5 at 6-7. Moreover, the appellant was proceeding pro se and pursuing several actions within a short time frame. Therefore, we find it appropriate to take official notice of the appellant's July 23, 2006 letter and our finding in

Wadhwa I that the appellant's disclosures in that letter were protected. *See, e.g., Melendez v. Department of Veterans Affairs*, 106 M.S.P.R. 128, ¶ 7 (2007) (noting that the Board has a long history of construing pro se pleadings liberally); *cf. Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 454 (1992) (finding that the AJ acted within the scope of his authority in not taking official notice of the evidence in the appellant's prior appeal where the appellant did not allege that the AJ denied him the opportunity to present evidence that he had submitted in that appeal), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table); *Ketchem v. Department of Transportation*, 12 M.S.P.R. 1, 4-7 (1982) (concluding by official notice subject to refutation that an unlawful strike of air traffic controllers occurred from August 3 through 6, 1981).

The appellant has failed to make a non-frivolous allegation of Board jurisdiction over his IRA appeal.

¶8 The Board has jurisdiction over an IRA appeal if the appellant has exhausted his or her administrative remedies before OSC and makes non-frivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). "Personnel actions" for purposes of the WPA are defined as the following: (i) an appointment; (ii) a promotion; (iii) an action under 5 U.S.C. Chapter 75 or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a

restoration; (vii) a reemployment; (viii) a performance evaluation under 5 U.S.C. Chapter 43; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination; and (xi) any other significant change in duties, responsibilities, or working conditions. 5 U.S.C. § 2302(a)(2)(A). In her show-cause order, the AJ stated that it did not appear that any of the alleged personnel actions were personnel actions under the WPA and ordered the appellant to show that they were. IAF, Tab 5 at 3.

¶9 The appellant has failed to make a non-frivolous allegation that his protected disclosure was a contributing factor in a "personnel action." The appellant identified personnel action 1 as reading him his *Miranda* rights and advising him that he was under investigation for alleged theft. The appellant has not made a non-frivolous allegation that an investigation, under the facts he alleged, constituted a "personnel action." *See* 5 U.S.C. § 2302(a)(2)(A); *Johnson v. Department of Justice*, 104 M.S.P.R. 624, ¶ 7 (2007). Granted, the Board will consider evidence of the conduct of an agency investigation when it is so closely related to a personnel action that it could have been pretext for gathering evidence to use to retaliate against an employee for whistleblowing. *Johnson*, 104 M.S.P.R. 624, ¶ 7. Here, though, the appellant has failed to make a non-frivolous allegation that the conduct of any investigation of alleged theft was so closely

related to a personnel action that it could have been such pretext.

¶10 The appellant identified personnel action 2 as staging an incident in an attempt to arrest him. The appellant has not made a non-frivolous allegation that an attempted arrest constituted a "personnel action."* *See* 5 U.S.C. § 2302(a)(2)(A); *Weber v. General Services Administration*, 54 M.S.P.R. 444, 446 (1992), *aff'd*, 989 F.2d 1203 (Fed. Cir. 1993) (Table). The appellant identified personnel action 3 as subjecting him to an unreasonable search and seizure. Similarly, the appellant has not made a non-frivolous allegation that a search and seizure constituted a "personnel action." *See* 5 U.S.C. § 2302(a)(2)(A).

¶11 Because we find that the appellant failed to make a non-frivolous allegation of a "personnel action," we find that he failed to establish jurisdiction over his IRA appeal. Accordingly, we AFFIRM the ID as MODIFIED.

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* In addition, the appellant did not allege that his protected disclosure was a contributing factor in alleged action 2. Rather, he alleged that it was retaliation for his civil suit. IAF, Tab 1 at 6. The AJ correctly found that such an allegation does not provide a basis for Board review of an IRA appeal. ID at 7; *see, e.g., Crawford v. Department of the Army*, 1 M.S.P.R. 428, 429 (1980). Similarly, the AJ correctly found that the appellant's allegation that the alleged personnel actions were retaliation for his EEO activity does not provide a basis for Board review of an IRA appeal. ID at 7; *see, e.g., Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶ 9 (2006).

ORDER

¶12 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____

William D. Spencer
Clerk of the Board
Washington, D.C.

Appendix Five

United States Court of Appeals for the Federal Circuit

Informal Brief of Petitioner
(Wadhwa2)

Docket No. 09-3169

May 25, 2009

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, NW
WASHINGTON, DC 20439

Dom Wadhwa, M.D., *pro se* Petitioner

v.

Department of Veterans Affairs, Respondent

Docket No. 09-3169

MSPB Docket No. PH-1221-08-0502-W-1
Filed on July 6, 2008
(Wadhwa2)

INFORMAL BRIEF OF PETITIONER (Wadhwa2)

I, Petitioner, Dom Wadhwa, M.D. ("Dr. Wadhwa"), respectfully file an Informal Brief of Petitioner with this Honorable Court for the Merit Systems Protection Board (MSPB, Board) Docket No. PH-1221-08-0502-W-1, filed on July 6, 2008.

The following are the responses to the questions for the Informal Brief of Petitioner:

Read the Guide for Pro Se Petitioners and Appellants before completing this form. Attach a copy of the initial and final decision or order of the Merit Systems Protection Board or arbitrator. Answer the following questions as best you can. Your answers should refer to the decision or order you are appealing where possible. Use extra sheets if needed.

1. Have you ever had another case in this court? Yes; In a United States district court? Yes; In the Equal Employment Opportunity Commission? Yes; If so, identify each case.

c. The United States Court of Appeals for the Federal Circuit Docket Number: 09-3167 for MSPB Docket Number: PH-1221-08-0019-W-1, filed April 20, 2009, is pending;

f. The United States Court of Appeals for the Federal Circuit Docket Number: 2008-3176, -3177 for MSPB Docket Numbers: PH-0752-07-0313-I-1 and PH-3443-07-0638-I-1 (Writ for Certiorari Docket No. 08 - 0702 for this appeal to The Supreme Court of the United States);

g. The United States Court of Appeals for the Third Circuit Docket No. 09-1835 for Civil Action No. 06-4362;

h. The U.S. District Court For The Eastern District of Pennsylvania Consolidated Civil Action No. 07-3301(Consolidated Civil Action Nos. 07-2677, 07-2997, 07-2750, and 07-3301);

i. Remanded EEO Case Nos. 200H-0642-2005100051, 200H-0642-2005101684, 200H-0642-05100781, 200H-0642-005100161, and 200H-0642-2005100318;
Request for Reconsideration for EEO Case No. 200H-0642-2008102059; Appeal pending on Final Agency Decision for EEO Case No. 2004-00642-2008100615.[32]

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[32] I filed my first EEO complaint on December 20, 2004. To date, I have not had a hearing for any of the EEO Cases listed above.

The 'Complainant's Response To The Agency Response to Complainant's Response to Show Cause' letter to the EEOC, dated December 7, 2007, **(Exhibit M)** explains some of the reasons as to why I have not had an EEOC Hearing since filing of my first EEO discrimination complaint on December 20, 2004.

2. Did the MSPB or arbitrator incorrectly decide or fail to take into account any facts? Yes; If so, what facts? (Refer to paragraph 7 of the Guide.)

The Opinion and Order (Wadhwa2)[33] issued by the Merit Systems Protection Board (Board), dated March 13, 2009 **(Exhibit K)** was based on review of an *untruthful and unsubstantiated* Initial Decision by Honorable Elizabeth D. Milligan, Administrative Judge (AJ), U.S. Merit Systems Protection Board, dated August 4, 2008. **(Exhibit D)**

In the March 13, 2009 Opinion and Order (Wadhwa2), the Board stated that I failed to make a *non-frivolous* allegation of a 'personnel action' and thus, I failed to establish Board jurisdiction over my IRA (individual right of action) appeal.

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[33] On March 13, 2009, the Board issued an Opinion and Order for two appeals on the same day. The first Opinion and Order was for MSPB Docket No. PH-1221-08-0019-W-1 (Wadhwa1), filed on October 10, 2007, and the second Opinion and Order was for MSPB Docket No. PH-1221-08-0502-W-1 (Wadhwa2), filed on July 6, 2008.

Also, the March 13, 2009 Opinion and Order (Wadhwa2) stated that the Board would have jurisdiction over my IRA appeal, if I had exhausted my administrative remedies before OSC and I made *non-frivolous* allegations that:

(1) I was engaged in whistleblowing activity by making a protected disclosure, and

(2) the disclosure was a contributing factor in the Agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001)

I assert that I have exhausted administrative remedies with OSC (U.S. Office of Special Counsel), that my appeal to the Board regarding the incidents of June 26, 2007, February 29, 2008, and June 27, 2008 made a *non-frivolous* allegation of a 'personnel action' and that the AJ's show cause order erroneously stated that it '*did not appear*' that any of the three incidents of June 26, 2007, February 29, 2008, and June 27, 2008 by the Agency were 'personnel actions' under the whistleblower protection act (WPA).

The Board has stated that 'personnel actions' for purposes of the WPA include alteration of working conditions as defined in Prohibited Personnel Practices under 5 U.S.C. § 2302(a)(2)(A). My working conditions were altered after the June 26, 2007, the February 29, 2008, and the June 27, 2008 incidents were used by the Agency in an attempt to gather evidence to use in order to terminate me from my VA employment.

In April 2009, the Board issued a letter which denied my request for reconsideration of the Board's March 13, 2009 Opinion and Order (Wadhwa2).

Statement of Facts

The facts and events that led to my appeal to the Board on July 6, 2008 are, as follows.

I am a staff physician at PVAMC who was *involuntarily* assigned to the Compensation and Pension (C&P) Section in January 2007 by the Agency officials at PVAMC. In September 2007, I was notified via e-mail by John Murphy, M.D., Director of Primary Care, that my involuntarily assignment to the C&P Section is permanent. In the March 13, 2009 Opinion and Order (Wadhwa1), the Board concluded that my July 23, 2006 protected disclosure to the VA Office of the Inspector General (VA IG), regarding safety issues at PVAMC, was a contributing factor to my *permanent* assignment to the C&P Section.

On June 26, 2007, in retaliation for my July 23, 2006 protected disclosure and EEO activity, Margaret O'Shea-Caplan, Associate Director of Finance at PVAMC, ordered my *False Arrest* for alleged theft of VA property (i.e., leaving the medical center with my personal items on June 23, 2007).[34] Ms. O'Shea-Caplan ordered the VA Police to detain me in a VA Police Holding Room for common criminals to read me my *Miranda* rights and then she placed me under investigation for this alleged theft of VA property, which was *pretext* for retaliation against me.

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[34] On Saturday, June 23, 2007, three days prior to my *false* arrest, while off duty I was in my office at the medical center and with the help a co-worker was reviewing information for my involuntary non-clinical assignment, discussed in detail in my March 23, 2009 response to the March 13, 2009 Opinion and Order (Wadhwa1). I made at least one trip to my car in the VA garage to bring in additional personal items. I was charged by Margaret O'Shea-Caplan, Associate Director of Finance at PVAMC, and by the Agency's witnesses at the May 29, 2008 MSPB Hearing, with alleged theft of VA property (for taking my personal items back to my car in the VA garage). This charge was purely *pretextual* in nature and it was made in reprisal for my whistleblower activity.

Ms. O'Shea-Caplan used VA Police surveillance camera tapes[35] and the assistance of Dr. John Murphy, Director of Primary Care and my first level supervisor, and other Agency officials[36] at PVAMC to order my *false arrest* on June 26, 2007 for the June 23, 2007 incident and ordered the VA Police to restrict my access to the hallway to my office from 7:30 a.m. to 4:30 p.m. on weekdays only and with no access on the weekends.

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[35] Margaret O'Shea-Caplan used the VA Police surveillance camera tapes from Saturday, June 23, 2007, to charge me with alleged theft of VA property (taking my personal items from my office to my car in the VA garage). On this day, to the best of my recollection, I entered the medical center with some of my personal items and later left the medical center with additional personal items. I made at least one trip to my car in the VA garage that day and brought in additional personal items to my office. At the end of the day, I left with all of my personal items. At the time of my departure from the VA garage, a VA Police Officer approached me in the VA garage and inspected the contents of my personal items. The VA Police Officer, upon inspection of my personal items, allowed me to leave the medical center. Three days later, on June 26, 2007, Ms. O'Shea-Caplan put me under investigation for theft of VA property (for taking personal items back to my car in the VA garage) using the VA Police surveillance camera tapes showing that I left the medical center with more personal items than when I arrived at the medical center. Ms. O'Shea-Caplan excluded from the VA Police surveillance camera tapes my trip to the car during the day when I brought in the additional personal items.

[36] Other Agency officials that were involved in ordering my *false arrest* on June 26, 2007 with Margaret O'Shea-Caplan and Dr. John Murphy are: Michael Grippi, M.D., former Chief of Medicine Service and my second level supervisor, Martin Heyworth, M.D., former Chief of Staff and my third level supervisor, Carol Patterson, Vice President for Medicine Service, and Jeffrey Kaufman, Chief of the VA Police at the medical center.

To date, I am not permitted to enter the medical center on the weekends. Thus, the Agency officials at PVAMC have altered my working conditions since my *false arrest* on June 26, 2007. For approximately the next six months, I was restricted from entering PVAMC at times other than my assigned tour of duty during the work week. Ms. O'Shea-Caplan ordered that a VA Police surveillance camera and a large clock be placed in the hallway outside my office door to monitor my activities during my tour of duty after my *false arrest* until sometime in July 2008.

On July 3, 2007, I filed a civil action lawsuit in the U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 07-2750 for violation of my civil rights (*Bivens Action*) for the June 26, 2007 incident.

On February 29, 2008, oral argument for the *Bivens Action* civil action lawsuit was held. During oral argument, the judge ordered me to provide her with the names of the Agency officials who were responsible for my June 26, 2007 *False Arrest*. Later that same afternoon, on February 29, 2008, in retaliation for this civil action lawsuit, Margaret O'Shea-Caplan, as then supervisor for the VA Police at the medical center, staged an incident in retaliation for my filing of the *Bivens Action* civil action lawsuit, in an attempt to *arrest* me for alleged battery, alleged assault, and alleged disorderly conduct.

Once again on June 27, 2008, in retaliation for the May 29, 2008 MSPB Hearing for my July 23, 2006 protected disclosure (discussed in Wadhwa1), Ms. Shea-Caplan subjected me to an unreasonable search

and seizure of my personal items in a clear plastic Acme bag.[37]

Thus, for purposes of the WPA, the Agency's prohibited personnel actions on June 26, 2007, February 29, 2008, and June 27, 2008 meet the criteria for 'personnel action' under 5 U.S.C. § 2302(a)(2)(A) (xi) which states, "any other significant change in duties, responsibilities, or working conditions."

It should be noted that these personnel actions taken on June 26, 2007, February 29, 2008, and June 27, 2008 by the Agency officials at PVAMC were *pretext* for gathering evidence to use in order to retaliate against me for my whistleblower activity. Thus, it is my contention that the AJ erred regarding the Board's lack of jurisdiction for this case.

On March 13, 2007 the Agency officials at PVAMC convened a *national* Administrative Investigation Board (AIB) and a *local* AIB in the Spring of 2007 (unknown date) to investigate my alleged *misconduct* at the time of my departure from PVAMC to the VA Northern Indiana Health Care System (VA NIHCS)

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[37] On June 27, 2008, a VA Police Officer at the medical center stopped me in the hallway to inspect the contents of my personnel items in a clear plastic Acme bag, as I was leaving the medical center at the end of my tour of duty for the day. The contents of this clear plastic bag were the same contents I had brought into the medical center earlier that same morning. The VA Police Officer *confiscated* my clear plastic Acme bag without cause and asked me to follow him to the VA Police surveillance camera area where he inspected the contents in this clear plastic Acme bag and then he returned the bag with the contents to me.

in October 2006 and my alleged *misconduct* during the June 9, 2006 patient incident, when I was trapped in an examination room by a belligerent, hostile patient who threatened me with severe bodily harm. The Agency officials at PVAMC have refused to provide me with the findings of fact reports for these investigations. I assert that the Agency officials were using the information from the *national* and *local* AIBs to gather evidence about me to support a personnel action for my removal from my over twenty-year employment with the Department of Veterans Affairs. Once again, I believe that the reasons given by the Agency officials for convening these AIBs were *pretext* for retaliation against me.

Please note that in the March 13, 2009 Opinions and Orders for MSPB Docket No. PH-1221-08-0019-W-1 (Wadhwa1) and for MSPB Docket No. PH-1221-08-0502-W-1 (Wadhwa2) the Board stated, it found:

3. The AJ erred in finding that my July 23, 2006 disclosure was not protected.
4. The AJ erred in finding that my disclosure was not a contributing factor in my (permanent) reassignment.
5. The AJ erred in applying the doctrine of collateral estoppel to preclude me from litigating whether my July 23, 2006 disclosure was protected.

Most importantly, the March 13, 2009 Opinion and Order (Wadhwa1) stated that the Board found that the AJ erred in finding that my July 23, 2006 protected disclosure was not a contributing factor in my (permanent) reassignment to the Compensation

and Pension (C&P) Section at PVAMC in January 2007.[38]

Also, in reprisal for the July 6, 2008 appeal to the Board (Wadhwa2), on February 11, 2009, Dr. Murphy and Margaret O'Shea-Caplan issued to me a *false* performance appraisal rating for FY 08, and on March 12, 2009, Dr. Murphy informed me that he and Ms. O'Shea-Caplan had decided that I will not receive the cash award for my successful certification in the performance of the C&P examinations.[39]

3. Did the MSPB or arbitrator apply the wrong law? Yes; If so, what law should be applied?

The AJ erred by issuing the Initial Decision (ID) too early for MSPB Docket No. PH-1221-08-0502-W-1. See Edeburn v. U.S. Postal Service, 95 M.S.P.R. 486, (2004) (it is error for an AJ to issue an ID before the expiration of time allowed for a party's response).

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[38] In January 2007, upon my involuntary assignment to the nonclinical position in the C&P Section at PVAMC, I was given a corresponding drop in salary of $2,257 and I was denied my performance pay of $5,000 for FY 06 by my immediate supervisors, Drs. Murphy and Grippi, after being away from PVAMC and at NIHCS for just three workdays. Also, in my case, the assignment to a nonclinical position in the C&P section by a ten member panel at PVAMC was involuntary on my part and it was based on a *critical need* for the Agency, and therefore, it is appealable to the Board.

[39] In the Certification of Clinicians Performing Compensation and Pension Examinations, VHA Directive 2008-005, dated January 29, 2008, it states that $1000 may be granted to physicians for successful certification in the performance of C&P examinations. I passed this C&P certification examination in April 2008.

Also, collateral estoppel does not apply to an issue which could not have been raised in the prior proceedings. (See Chern v. Bank of America (1976) 15 Cal.3d 866, 871-72; Vella v. Hudgins, supra, 20 Cal.3d 251, 255.)

In summary, the AJ in her Initial Decision for this case, MSPB Docket No. PH- 1221-08-0502-W-1 (Wadhwa2), and for her earlier case, MSPB Docket No. PH-1221-08-0019-W-1 (Wadhwa1), did not summarize the evidence, resolve issues of credibility, and include them in her conclusions of law and her legal reasoning, as well as the authorities on which that reasoning rests. See Spithaler v. Office of Personnel Management, 1 M.S.P.R. 587, 589 (1980)

4. Did the MSPB or arbitrator fail to consider important grounds for relief? Yes; If so, what grounds?

Relief requested from this Honorable Court:

Admission of wrongdoing Agency officials at the Philadelphia VA Medical Center (PVAMC);

Issue an order to stop the Agency's officials at PVAMC from further harassment of me in the workplace because of my July 23, 2006 protected disclosure and my ongoing EEO activity;

Issue an order for my return to my over twenty-two year tenured clinical position in Primary Care at PVAMC;

Formation of a Five-Member Physician Committee at PVAMC, with me as the Chairman of this

Committee, in order to provide ongoing recommendations to the Agency to prevent a similar occurrence as that which occurred to me, from happening at PVAMC in the future;

Issuance by the Court of a mandatory injunction prohibiting the Agency officials at PVAMC from the relentless harassment of me in the workplace for exercising my civil rights;

Dismissal of Kathleen Craige, R.N., Primary Care Nurse Manager, from the Department of Veterans Affairs for aiding Dr. Murphy and Dr. Grippi in engaging in prohibited personnel practices against me;

Dismissal of Dr. Murphy from the Department of Veterans Affairs for his lack of integrity, violation of VA standards of ethical conduct, conduct policies, performance expectations and prohibited personnel practices;

Reporting of Dr. Murphy and Dr. Grippi to the Medical Licensing Board and the Physicians' National Data Bank for their lack of integrity, violation of VA standards of ethical conduct, conduct policies, performance expectations and prohibited personnel practices;

Dismissal of Margaret O'Shea-Caplan, Associate Director of Finance, for aiding Dr. Murphy and Dr. Grippi in the use of retaliatory, discriminatory prohibited personnel practices against me.

All elements of damages allowable by law and any other applicable entitlements, including punitive

damages (in an amount to be determined by the Court to deter the Agency officials at PVAMC from similar misconduct in the future), compensatory damages, consequential damages, and reasonable attorney fees.

5. Are there other reasons why the MSPB's or arbitrator's decision was wrong? Yes; If so, what reasons?

In an IRA appeal to the Board, I have to show by preponderant evidence that I was engaged in whistleblowing and that the whistleblowing was a contributing factor in the Agency's decision to take a personnel action, unless the Agency shows by clear and convincing evidence that it would have taken the personnel action absent the whistleblowing. *Mangano*, 104 M.S.P.R. 316.

When determining whether the Agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board considers the strength of the Agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the Agency officials who were involved in the decision; and any evidence that the Agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated. It should be noted that none of my physician colleagues, who are otherwise similarly situated to me but are not whistleblowers, have experienced incidents like the ones I have experienced since I made my July 23, 2006 protected disclosure.

After my July 23, 2006 protected disclosure, I believe that Margaret O'Shea-Caplan, my supervisors, and other Agency officials then began a series of retaliatory acts to undermine my career.

These acts included, but are not limited to:

1. The **June 26, 2007 incident** (*false arrest*)
2. Placement of a VA Police surveillance camera and a large clock in the hallway outside my office door after my June 26, 2007 *false arrest* in order to monitor my activities during my tour of duty until sometime in July 2008
3. The **February 29, 2008 incident** (staged incident in an attempt to arrest me for alleged *battery*, alleged *assault*, and alleged *disorderly conduct*)
4. The **June 27, 2008 incident** (*unreasonable search and seizure* of my personal items)
5. The March 2007 national and local AIBs to investigate me for alleged *misconduct*.

Applying the "knowledge/timing test" to the June 26, 2007, February 29, 2008, and June 27, 2008 incidents at PVAMC, it is obvious that these three incidents were within the period of time such that a reasonable person would conclude that my July 23, 2006 protected disclosure was a contributing factor to these incidents, which were, in fact, attempted personnel actions for my removal from my VA employment. Eleven months is well within the range of time between a disclosure and a personnel action from which an inference of causation arises. *Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250 (2008) (finding that a time period of slightly more than one year satisfied the timing test,

and citing cases that also so held) Thus, I have satisfied the knowledge/time test and this should be considered as evidence on the issue. *Gonzalez*, 109 M.S.P.R. 250 (2008)

I do not believe that the Board is divested of jurisdiction over the above three incidents simply because the Agency officials at PVAMC only initiated formal investigations that could have led to a major disciplinary action or termination based on these three incidents on which I filed my Board appeal, and thus further adjudication is, therefore, required regarding all of these matters.

I must be afforded the opportunity to show that the above three personnel actions at issue were within the Board's IRA jurisdiction and to have an opportunity to adjudicate the merits of any personnel action found to be within the Board's jurisdiction.

Further adjudication would be concerned with the motive to retaliate by the Agency officials involved in the decision to remove me, and a reassessment of whether the Agency met its ultimate burden of proof; and I would be afforded an opportunity to show that the remaining acts of retaliation were within the Board's IRA jurisdiction and, if so, they would be adjudicated on the merits.

I believe I have the right to show the strength of the Agency officials' motive to retaliate against me. I assert that I have been denied full adjudication of the existence and strength of the Agency officials' motive to retaliate and to show evidence that these three incidents were attempts at information gathering to charge me with a major disciplinary

action and/or removal from my VA employment. Further, I assert the AJ's failing to recognize these three incidents were personnel actions, and I note the AJ has again failed to address the significance of these personnel actions at issue.

Also, I believe that the AJ erred in limiting evidence regarding the existence and strength of any motive to retaliate on the part of the Agency officials who were involved in the staging of the three incidents with the intent to issue a major disciplinary action and/or terminate me from my VA employment. This analysis involves several inquiries – who were the officials "involved" in the decision to terminate me, did any official have a motive to retaliate against me because of my whistleblowing, and how strong were the motives.

In determining the officials "involved" in the termination the analysis cannot be restrictive in its scope. In examining retaliatory motive for an Agency action, officials "involved" in the action may encompass more than just the proposing or deciding officials, and may include other officials upon whom the proposing or deciding official relied for information. *See Redschlag v. Department of the Army*, 89 M.S.P.R. 589, 65-67 (2001), *review dismissed*, 32 F. App'x 543 (Fed. Cir. 2002)

Because Dr. Murphy and Ms. O'Shea-Caplan were involved in the Agency's decision to terminate me and were the subject of my whistleblowing, I assert that I am entitled to explore the strength of any motive these individuals might have had to retaliate against me for my whistleblowing. I was denied the opportunity to explore that these individuals had an

"obvious bias" against me, that the motive to retaliate was very strong because the February 29, 2008 and June 27, 2008 incidents occurred immediately after a court oral argument and an MSPB Hearing that involved these same individuals.

Also, I was denied the opportunity to determine the reasons for Margaret O'Shea-Caplan's and Dr. Murphy's animosity. Those reasons for the recognized intense animosity and bias, however, are precisely what need to be explored to determine whether these individuals had a strong motive to retaliate against me for whistleblowing. Further adjudication regarding Ms. O'Shea-Caplan's and Dr. Murphy's reasons for their bitterness and animosity toward me is, therefore, again required. Without further adjudication, I would be unable to decide the strength of these individuals' motives to retaliate against me for my whistleblowing.

In *Johnson v. Department of Justice*, 104 M.S.P.R. 624, (2007), the Board had found that an investigation is not generally a personnel action. However, in *Johnson* it is further found that the Board will consider evidence regarding the conduct of an investigation where it is so closely related to a personnel action that it could have been *pretext* for gathering evidence to use to retaliate against an employee for whistleblowing. The AJ erroneously concluded that my three incidents were not personnel actions and were unrelated to my July 23, 2006 whistleblowing.

Thus, the Agency has to prove by clear and convincing evidence that it would not have staged the three incidents in order to gather information to

support a major disciplinary action/removal charge regardless of my whistleblowing and one then has to examine the alleged *misconduct* charges, the question arises whether all of these three incidents are so closely related to those charges that these investigations could have been a *pretext* for gathering evidence to use to retaliate against me in effecting my removal. *See Johnson*, 104 M.S.P.R. 624, 7. In making this determination, the Board looks at the investigation's origins. *Russell v. Department of Justice*, 76 M.S.P.R. 317, 323- 24 (1997)

The three incidents triggered fact-finding and the results from any or all of them could be used to convene another forum for obtaining the same information that could be used to ultimately take an action, and whenever a formal investigation is convened, a resulting personnel action is possible. The three incidents were so closely related to the alleged *misconduct* charges supporting a major disciplinary action or my removal that they could have been *pretext* for gathering evidence to use to retaliate against me for whistleblowing. *Johnson*, 104 M.S.P.R. 624.

The evidence shows that at least three investigations were convened by the very Agency officials who were the subject of my whistleblowing, that these investigations were conducted in an unusual manner, and that although these investigations are intended to occur in an open forum for discussing issues without the fear of subsequent discipline, these investigations were used to restrict my access to my office, monitor my daily activities with a VA Police surveillance camera and a large clock outside my office door, and limit my access to the medical

center. These investigations could be used to possibly convene an AIB for each of these three incidents to further investigate me to bring about *misconduct* charges against me, with the AIB report to issue findings about my alleged *misconduct* and to make recommendations for disciplinary action or terminate me from my VA employment.

Thus, should the AJ require an examination of these three incidents and the alleged *misconduct* charges against me, my claim of retaliation by these investigations in connection with the three incidents is properly before the Board and should be considered in determining the strength of the Agency's evidence supporting disciplinary action or proposed removal for these alleged *misconduct* charges. *See Russell*, 76 M.S.P.R. at 323-28.

6. What action do you want the court to take in this case?

Remedies requested from this Honorable Court:

I hereby request further adjudication regarding whether the Agency proved by clear and convincing evidence that it would have issued a major disciplinary action and/or terminate me from my VA employment in the absence of my whistleblowing.

Specifically, I request that I be allowed to develop and present evidence concerning the three incidents, that they were personnel actions, and that the Agency's motive was to use the investigations related to these incidents to discipline me or to terminate me from my VA employment. This evidence should then be considered with respect to the issue of the

strength of the evidence the Agency relied upon in taking the personnel actions.

Also, I must also be allowed to develop and present evidence regarding the strength of the motive to retaliate by Agency officials involved in staging the three incidents, including Margaret O'Shea-Caplan, Dr. Murphy and any other Agency officials shown to be involved in these actions. This evidence should then be considered, along with evidence regarding the strength of the evidence the Agency relied upon in taking the actions and whether the Agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated, in determining whether the Agency has met its ultimate burden of proof.

If the Board concludes that the Agency has not met this burden, I request that the Board decide the remaining issues in the appeal. If that

entails examining whether the Agency would have issued the August 30, 2006 proposed removal of me absent my whistleblowing, based upon the Agency's gathering of information about my alleged *misconduct* charges, I request that the Board consider including the investigations from the March 2007 national and local AIBs, as well as the three incidents on June 26, 2007, February 29, 2008, and June 27, 2008, in assessing the strength of the Agency's evidence supporting these actions in an attempt to issue a major disciplinary action and/or terminate me from my VA employment.

Finally, I renew my request for the AJ to conduct any required adjudication regarding the June 26, 2007,

February 29, 2008, and June 27, 2008 incidents. This would include deciding the Board's jurisdiction over those claims and, if any matter is within the Board's jurisdiction, appropriate adjudication on the merits of those claims.

7. Do you want to argue before the court in person? Yes; If yes, what are the reasons why argument will aid the court? (Refer to paragraph 15 of the Guide.)

I would like to present oral argument on the information attached in the appendix I and appendix II which is, as follows:

a) My Initial Appeal to the Board, dated July 6, 2008, with the attached copies of:
   1. the July 23, 2006 protected disclosure
   2. the December 17, 2007 Burgess Notice in Support of Jurisdiction under the WPA **(Exhibit A)**

b) Order to Show Cause, dated July 10, 2008 **(Exhibit B)**

c) My response to the Order To Show Cause, dated July 16, 2008 **(Exhibit C)**

d) Initial Decision by the AJ, dated August 4, 2008 **(Exhibit D)**

e) My August 20, 2008 Request for Reconsideration of Initial Decision by the AJ, dated August 4, 2008 **(Exhibit E)**

f) My August 20, 2009 Petition For Review by the Board of the Initial Decision Order issued by the AJ, dated August 4, 2008 **(Exhibit F)**

g) Acknowledgment by the Board of my Petition For Review on August 20, 2008 **Exhibit G)**

h) Letters from the U.S. Office of Special Counsel,

dated October 12, 2006, September 27, 2007, and August 14, 2008 **(Exhibit H)**

i) Summary of the MSPB Cases **(Exhibit I)**

j) Letter from the Settlement Attorney, dated September 29, 2008 **(Exhibit J)**

k) Opinion and Order (Wadhwa2), dated March 13, 2009 **(Exhibit K)**

l) My Request for Reconsideration, dated March 30, 2009 of the Opinion and Order MSPB Docket No. PH-1221-08-0502-W-1 (Wadhwa2), dated March 13, 2009 **(Exhibit L)**

m) Agency Counsel's Attempt to force involuntary settlement of my EEO cases, dated December 7, 2007 **(Exhibit M)**

Also, I would like to discuss the multiple attempts by the Agency officials at PVAMC for constructive removal action against me.

8. Do you intend to represent yourself? Yes; If you have not filed an Entry of Appearance, indicate your full name, address, and telephone number.

Dom Wadhwa, M.D., 215 E Camden Ave, H-13,
Moorestown, NJ 08057
Telephone: (609) 220-2771 (cell)

9. I certify that a copy of this brief with Appendix I and Appendix II were sent to the attorneys for respondent, at the following address:

The undersigned hereby certifies that true and correct copies of the foregoing *Informal Brief of Petitioner for MSPB Docket No. PH-1221-08-0502-W-1, filed on July 6, 2008 (Wadhwa2)* with Appendix I and II in the above matter were served upon the following by first class mail, this date, to:

Lauren A. Weeman, Trial Attorney
Commercial Litigation Branch, Civil Division
U.S. Department of Justice
1100 L Street, NW, Room 12062
Washington, DC 20530
Telephone: (202) 353-7410; Fax (202) 514-8624

Jeffrey A. Gauger, Esquire
Attorney, Office of General Counsel
Merit Systems Protection Board
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Assistant General Counsel
Department of Veterans Affairs
Office of General Counsel, Professional Staff Group 6
810 Vermont Avenue, NW, Room 1030
Washington, D.C. 20420

_____

Dom Wadhwa, M.D., *pro se*
Petitioner

Date: May 25, 2009

In addition to mailing a copy to the attorney for the respondent, mail an original and three copies of this informal brief and appendix to:

(Address is found on the Entry of Appearance served on you by the attorney for the respondent. If you do not send a copy of this brief to the respondent, the court will not file the brief.)

Clerk of Court
United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

Appendix Six

United States Court of Appeals for the Federal Circuit

Request for Oral Argument
By the Petitioner
(Wadhwa2)

Docket No. 09-3169

September 14, 2009

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, NW
WASHINGTON, DC 20439

Docket No. 09-3169

Dom Wadhwa, M.D., *pro se,* (Wadhwa2)
Petitioner

Department of Veterans Affairs,
Respondent.

Request for Oral Argument by Petitioner, Dom Wadhwa, M.D., *pro se*

Pursuant to the United States Court of Appeals for the Federal Circuit Rules of Practice, I, Dom Wadhwa, M.D., *pro se,* request that the Court hold oral argument on the issues that are the subject of the petitions for review, Case No. 09-3169, of the March 13, 2009, Merit Systems Protection Board's (MSPB) Final Decision in this proceeding for Docket No. PH-1221-08-0502-W-1 (Wadhwa2).

This Honorable Court should hold oral argument for Case No. 09-3169 because the petitions for review raise issues that are critical for me, as a *pro se* petitioner, to the successful outcome of my appeal for this case.

Furthermore, Lauren A. Weeman, Esquire, Trial Attorney and Respondent for the defendant,

contacted me on or about June 30, 2009 via telephone, requesting an extension of time to file "Respondent's Brief" for Case No. 09-3169. Ms. Weeman requested an extension of time because she was not provided with any evidence by the Agency officials at the Philadelphia VA Medical Center ('PVAMC' or 'Agency') for this case.

Also, Ms. Weeman in her petition entitled, "Respondent's Informal Brief and Appendix," that was filed on June 30, 2009 raises "new issues" and makes "new claims" about my case which must be addressed by me to this Honorable Court, before it can decide on the briefs without prejudice to full consideration of these issues.

By Order in May 2009, the United States Court of Appeals for the Federal Circuit granted the petitions for review of MSPB's March 13, 2009 Final Decision, including in my petition for review the finding that during the May 29, 2008 MSPB Hearing, Honorable Elizabeth D. Milligan, Administrative Judge (AJ), erred in her Initial Decision for MSPB 33 (Wadhwa1). The Board stated it found:

6. The AJ erred in finding that my disclosures (Dom Wadhwa, M.D., *pro se*, Appellant "Dr. Wadhwa") were not protected.
7. The AJ erred in finding that my disclosures were not a contributing factor in my reassignment.

Most importantly, the March 13, 2009 Opinion and Order states that the **Board found that the AJ**

erred in finding that my disclosures were not a contributing factor in my reassignment.

Federal Rules of Appellate Procedures state that the United States Court of Appeals will hold oral argument unless exceptional circumstances make oral argument impractical or inadvisable. No such circumstances exist here.

In fact, the opposite is true; oral argument is appropriate here because of the importance of the issues raised by the petitions for review. Obviously, the petitions for review are of critical importance to me as they may affect the outcome of my appeal to this Court.

If the MSPB's March 13, 2009 Final Decision for Wadhwa2 is upheld based solely on the content of Ms. Weeman's brief, the Court will be unable to reach conclusions based on facts.

For example, Ms. Weeman's "Respondent's Informal Brief and Appendix," dated June 30, 2009, states:

"In Wadhwa B (Wadhwa2), the Board denied Dr. Wadhwa's petition for review ("PFR") upon finding that the agency would have reassigned Dr. Wadhwa not withstanding his protected disclosure and the PFR, therefore did not meet the criteria for review set forth at 5 C.F.R. §1201.115. 2009 M.S.P.B. 33. Dr. Wadhwa has appealed that decision of the MSPB to this Court (Fed. Cir. No. 2009-3167))"

This is a bold-faced lie provided by Ms. Conroy to the AJ through *ex parte* communication.

This bold-faced lie is being perpetuated as "a fact" by Ms. Weeman in her "Respondent's Informal Brief and Appendix," for my current appeal to this Honorable Court, Case No. 09-3169.

On May 29, 2008, during the MSPB 33 (Wadhwa1) Hearing, for the first time the Agency officials at PVAMC, through Stacey Conroy, the Agency's Counsel, informed the AJ and me that the *false* performance appraisal rating regarding my clinical competence had been *rescinded* due to an *'administrative error'*. This document was used as the basis for my *permanent* reassignment to the C&P Section by the Agency's witnesses.

This statement is a **bold-faced lie** that was provided *ex- parte* by Ms. Conroy to the Board. The FY05 proficiency rating was never withdrawn by my supervisors, Drs. John Murphy and Michael Grippi.

If this rating was withdrawn in early 2006, why was I not provided with the fully satisfactory rating report? Why was this *untruthful and unsubstantiated* proficiency rating report from FY05 used in January 2007 by Drs. Murphy and Grippi to permanently assign me to the Compensation and Pension (C&P) Section?

This bold-faced lie is being perpetuated as "a fact" by Ms. Conroy.

Drs. Murphy's and Grippi's Performance Appraisal Narrative written about me (Dr. Wadhwa) on December 7, 2005, and included as part of my last annual proficiency report, contained untruthful and unsubstantiated statements and resulted in an unsatisfactory rating (FY 05 Rating Period).

Dr. Murphy and Dr. Grippi did not provide me with documented evidence to support the statements they recorded in this annual proficiency report. Dr. Murphy stated to me at the time he gave me this annual proficiency report that he does not have to provide me with documented evidence.

It should be noted that Michael Sullivan, former Medical Center Director at PVAMC, ordered Dr. Murphy and Dr. Grippi to rewrite this annual proficiency report as fully satisfactory in January of 2007. Dr. Murphy and Dr. Grippi did not do this. In the MSPB hearing, Case No. PH 1221-08-0019-W-1, on May 29, 2008, the Agency's attorney, Stacey Conroy, stated that this annual proficiency report was rescinded sometime in 2006. I was never informed of this personnel action. If this proficiency

was, in fact, rescinded in 2006, why did Mr. Sullivan and Gerald Morelli, Director of Human Resources, not inform me of this personnel action in February 2007? Instead, I became aware sometime in March 2007 that Dr. Murphy and Dr. Grippi converted this annual proficiency report to an interim proficiency report after the Northern Indiana VA Medical became aware of the prohibited personnel practices being used by Dr. Murphy and by Dr. Grippi. Dr. Murphy was unable to initiate a Performance Improvement Plan for me, because the information in this annual proficiency report is untruthful and unsubstantiated.

Please note:

Drs. Murphy's and Grippi's Performance Appraisal Narrative written about another physician (African American) in the C& P Section (C&P MD) contained untruthful and unsubstantiated statements on January 25, 2008, similar to those included in my (Dr. Wadhwa's) last annual proficiency report. This Performance Appraisal Narrative was included as part of the C&P MD's last annual proficiency report and resulted in a low satisfactory rating (FY 07 Rating Period).

Subsequently, Dr. Murphy and Dr. Grippi issued a reprimand to this physician in the C&P Section, allegedly for not following Dr. Grippi's order, similar to a reprimand they issued to me allegedly for not carrying out Dr. Murphy's order.

Please note: In January 2008, this African American physician was not provided with an explanation for the statements documented in this annual proficiency report. Dr. Murphy and Dr. Grippi were planning to initiate a Performance Improvement Plan (PIP) for this African American physician based on these untruthful and unsubstantiated statements. Dr. Murphy and Dr. Grippi were unable to initiate a Performance Improvement Plan for this African American physician. Dr. Murphy and Dr. Grippi have rescinded this African American physician's annual proficiency report and no Performance Improvement Plan was issued. The African American physician was offered no explanation by the Agency (just like the Agency rescinded my annual proficiency report without notifying me).

Similarly, during the December 7, 2005 meeting with me, Dr. Murphy stated to me that I would be placed on a Performance Improvement Plan (based on the untruthful statements in the annual proficiency report) but he never did this.

Both of us were not offered an explanation by our supervisors, Dr. Murphy and Dr. Grippi, for the unsatisfactory and the low satisfactory annual proficiency ratings. Both of us were never placed on PIPs.

This example makes it clear that Ms. Weeman in her "Respondent's Informal Brief and Appendix," repeatedly makes completely false statements based on bold-faced lies made by Ms. Conroy. Then, Ms. Weeman reaches conclusions, not based on the genuine facts, but rather on newly invented claims. Furthermore, Ms. Weeman has not produced a

single shred of evidence to support any of the claims made by her as defendant's counsel.

The strategy used by Ms. Weeman is to systematically ignore all of my well-founded claims and create issues to distract and mislead this Honorable Court.

Finally, if this Honorable Court affirms the Final Decision by the Board, it will serve to allow the Agency officials at the Philadelphia VA Medical Center (PVAMC) to unjustly discipline, harass and bully physicians, such as myself.[40]

For example: After my July 23, 2006 protected disclosure, I believe that Margaret O'Shea-Caplan, my supervisors, and other Agency officials then began a series of retaliatory acts to undermine my career.

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[40] I am being treated in the same fashion as Dr. Arthur Newmark was treated by Dr. Murphy and the Agency officials at the Philadelphia VA Medical Center (PVAMC) in Civil Action Case No. 99-CV-5798 *Newmark v. John J. Murphy and the agency* **(the same John J. Murphy, M.D., and the same Agency officials at PVAMC that are involved in formulating false accusations against me).** This civil action case states that when information in a physician's **"evaluation was factually incorrect and he asked how it could be corrected"**.....the physician was told that he could **"attach a note of explanation, but that PVAMC had no procedure to remove false information."** Dr. Newmark, the physician in this case, was ultimately terminated by the Agency officials at PVAMC based on false information. However, in this case where **John Murphy, M.D., and the Agency were the defendants, the case was settled out of court for a sum of $ 297,154.00 on August 28, 2000.**

These acts included, but are not limited to:

1. The **June 26, 2007 incident** (*false arrest*)
2. Placement of a VA Police surveillance camera and a large clock in the hallway outside my office door after my June 26, 2007 *false arrest* in order to monitor my activities during my tour of duty until sometime in July 2008
3. The **February 29, 2008 incident** (staged incident in an attempt to arrest me for alleged *battery*, alleged *assault*, and alleged *disorderly conduct*)
4. The **June 27, 2008 incident** (*unreasonable search and seizure* of my personal items).

Therefore, I, petitioner, respectfully request the opportunity to address these and other arguments made by or omitted by defendant's counsel in the "Respondent's Informal Brief and Appendix."

As stated in my request for Oral Argument for MSPB 33 (Wadhwa1), I believe oral argument is necessary and appropriate to fairly resolve defendant counsel's motion, and will benefit and assist the Court in its resolution of:

(d) the actual facts in my case and

(e) whether I, as the Petitioner, am entitled to have these false and misleading statements by Ms. Weeman stricken from the record.

For the foregoing reasons, the Court should grant this request and provide for oral argument on the issues raised by the petitions for review in this proceeding.

Respectfully submitted,

Dom Wadhwa, M.D., *pro se*

Dated: September 14, 2009

Petitioner's Home Address
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In addition to mailing a copy to the attorney for the respondent, I am mailing an original and three copies of this brief and appendix to:

Clerk of Court
United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

SUPREME COURT
OF THE UNITED STATES
1 First Street, NE
Washington, DC 20543

CERTIFICATE OF COMPLIANCE
Nos. 2009- 3167, -3169

United States Court of Appeals
for the Federal Circuit

DOM WADHWA, M.D., *pro se,*
Petitioner

v.

Department of Veterans Affairs,
Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 4,207 words (with spaces), excluding the parts of the petition that are exempted by Supreme Court Rule 33.1 (d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 14, 2010.

/s/ Dom Wadhwa, M.D.
Dom Wadhwa, M.D., *pro se*
Petitioner

SUPREME COURT
OF THE UNITED STATES

1 First Street, NE
Washington, DC 20543

DOM WADHWA, M.D.,
Petitioner *(pro se)*

v.

Department of Veterans Affairs,
Respondent.

Docket Numbers
2009-3167, -3169
U.S. Court of Appeals for
the Federal Circuit

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing *Petition For A Writ of Certiorari In The U.S. Supreme Court* in the above matter were served upon the following by first class mail, this date, to:

Matthew Solomson, Esquire
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/s/ Dom Wadhwa, M.D.
Dom Wadhwa, M.D., *pro se*
Petitioner
February 14, 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies (*three copies*) of the foregoing *Petition For A Writ of Certiorari In The U.S. Supreme Court* in the above matter were sent by first class mail, this date, to:

Solicitor General of the United States
Department of Justice, Room 2614
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Telephone: (202) 514-2203

/s/ Dom Wadhwa, M.D.
Dom Wadhwa, M.D., *pro se*
Petitioner

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February 14, 2010